Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, ET AL.,

Petitioners,

—v.—

JOHN L. MCMILLAN, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Docket 00055

56-71

SIRICA, J.

JOHN DOE, ET AL

vs.

JOHN L. MCMILLAN, ET AL

DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND DAMAGES

Jury Demanded

Civil Docket 00056

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DATE	PROCEEDING
1971	
	Deposit for cost by Without prepayment of costs. Robinson, J.
Jan. 8	Complaint, appearance; jury demand; filed #46 serv. 1-28-71
Jan. 8	Summons, copies (34) and copies (34) of Complaint issued Defts. #1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 46 & #47; #1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 serv. 1-19; #3 NF 1-19 (deceased); #17 serv. 1-20; #18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31sv. 1-19; #47 serv. 1-19

DATE	PROCEEDING
1971	
Jan. 8	Summons, copies (14) & copies (14) of Complaint issued Defts. #32, 33, #34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44 & #45; all but #41 serv. 1-18
Jan. 8	Order denying Plaintiffs' motion to proceed under Fictitious Names and setting for hearing in Motions II; Clerk to notify U.S. Attorney forthwith. (signed 1/7/71) McGuire, J.
Jan. 8	Motion of pltffs. for leave to proceed under fictitious names and for immediate consideration of this motion; P & A's. filed
Jan. 8	Motion of pltffs. for leave to proceed without prepayment of costs or fees; P & A's. filed
Jan. 8	Order granting pltffs' motion to proceed in Fictitious Names. (N) Robinson, J.
Jan. 8	Order granting pltffs' motion to proceed without prepayment of costs. (N) Robinson, J.
Jan. 8	Motion of pltffs' for Temporary Restraining Order; Memorandum. filed
*Jan. 8	Motion of pltffs' for Preliminary Injunction; cert. of ser. filed
*Jan. 11	Order denying pltfs. application for Temporary Restraining Order and dismissing complaint. (N) Sirica, J.
Jan. 12	Notice of appeal in forma pauperis from order of 1-11-71 submitted to Judge Sirica; copies mailed to Joseph Hannon and Thomas Nedrich. filed
Jan. 12	Leave to proceed on appeal without prepayment of costs, granted. Sirica, J.
Jan. 12	Transcript of proceedings, 1-8-71, pages 1-32; Nicholas Sokal, Reporter. (Court's copy) filed
Jan. 12	Exhibit "A" by pltfs. filed

DATE	PROCEEDING
1971	
Jan. 12	Exhibit "A" by defts. filed
*Jan. 11	Application of pltf. for transcript of hearing for Temporary Restraining Order at the expense of the United States. filed
*Jan. 8	Application of pltfs. for a Temporary Restraining Order heard, denied, and complaint dismissed. (OTBP) (Reporter N. Sokal) Sirica, J.
Jan. 11	Order denying application of pltfs for a temporary restraining order and dismissing complaint as to all defts. (N) Sirica, J.
Jan. 12	Record on Appeal delivered to USCA; In Forma Pauperis (Clerk's fee $1.40)
Jan. 12	Receipt from USCA for Original Record. filed
Jan. 12	Authorization for transcript at expense of U. S. (N) Sirica, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 56-71

JOHN DOE, BY HIS GUARDIAN MARY DOE; RICHARD ROE, BY HIS GUARDIAN MARY ROE; on their own behalf and on behalf of all others similarly situated, PLAINTIFFS

v.

JOHN L. MCMILLAN, THOMAS G. ABERNETHY, WILLIAM L. DAWSON, JOHN DOWDY, CHARLES C. DIGGS, G. ELLIOTT HAGAN, DON FUQUA, DONALD M. FRASER, BROCK ADAMS, ANDREW JACOBS, PETER N. KYROS, WILLIAM L. HUNGATE, EARLE CABELL, RAY BLANTON, ANCHER NELSEN, WILLIAM L. SPRINGER, ALVIN E. O'KONSKI, WILLIAM H. HARSHA, JOEL T. BROYHILL, LARRY WINN, GILBERT GUDE, LAWRENCE J. HOGAN, VERNON W. THOMSON, HENRY P. SMITH III, EARL F. LANDGREBE, as chairman and members of the Committee of the District of Columbia of the United States House of Representatives, 1310 Longworth House Office Building, Washington, D.C. 20515:

JAMES T. CLARK, clerk, CLAYTON S. GASQUE, staff director; HAYDEN S. GARBER, counsel; Committee on the District of Columbia of the United States House of Representative, 1310 Longworth House Office Building, Washington, D.C. 20515:

PAUL YATES LITTLE, individually, and as consultant, Committee on the District of Columbia of the United States House of Representatives, 1310 Longworth House Office Building, Washington, D.C. 20515:

ROBERT E. KING, Superintendent of Documents, and NICHOLAS A. SPENCE, Public Printer, United States Government Printing Office, North Capitol and H Streets, Washington, D.C. 20401:

ANITA FORD ALLEN, President Board of Education of the District of Columbia, Presidential Building 415 Twelfth Street, N.W., Washington, D.C. 20004:

JAMES E. COATES, MURIEL M. ALEXANDER, CHARLES I. CASSELL, EDWARD L. HANCOCK, NELSON C. ROOTS, ALBERT A. ROSENFIELD, MARTHA A. SWAIM, MATTIE G. TAYLOR, BARDYL R. TIRANA, EVIE M. WASHINGTON, Members of the Board of Education of the District of Columbia, Presidential Building, 415 Twelfth Street, N.W., Washington, D.C. 20004:

HUGH SCOTT, Superintendent Public Schools of the District of Columbia, Presidential Building, 415 Twelfth Street, N.W., Washington, D.C. 20004:

OTHIELLO SAVOID, Individually and as Principal of Jefferson Junior High School, Eighth Street and H Street, S.W., Washington, D.C. 20024:

VIOLA M. IRVEN, Individually and as Teacher at Jefferson Junior High School, Eighth and H Streets, S.W., Washington, D.C. 20024:

LOUIS E. MARTIN, Individually and as Investigator, Committee on the District of Columbia of the United States House of Representatives 8244 Pennsylvania Avenue, S.E., Washington, D.C. 20020:

UNITED STATES OF AMERICA, U.S. Attorney General, Department of Justice, Washington, D.C., DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND DAMAGES—Filed January 8, 1971

I. *Preliminary Statement and Jurisdiction*

(1) This is a class action for declaratory judgment and injunctive relief to enjoin defendants from publishing certain information regarding school children at the Jefferson Junior High School and other District of Columbia Schools, which violates their statutory, regulatory, administrative, common law, and Constitutional rights and for damages for tortious violation of plaintiffs' and plaintiffs' children's right to privacy.

(2) As a result of publication of information regarding members of the class, plaintiffs and plaintiffs' children have suffered and will continue to suffer irreparable

injury. There exists between plaintiffs and defendants an actual controversy justiciable in character, in respect to which this Court can render an adequate and effective judgment which will advance the interests of justice. The relief plaintiffs seek is a declaratory judgment that certain actions by defendants are unlawful, for unjunctive relief to compel defendants to refrain from violating plaintiffs' rights, and for damages. This suit raises questions under the Constitution and laws of the United States and the amount in controversy, exclusive of interests and costs, exceeds $10,000. This Court has jurisdiction pursuant to 11 D.C. Code § 521; 1 D.C. Code § 1501 et. seq. 28 U.S.C. § 1331, 1343, 1346, 1361, 2201, 2202, and 42 U.S.C. § 1983; 28 U.S.C. 1651.

II. *Plaintiffs—Class Action*

Plaintiffs are citizens of the United States and residents of the District of Columbia. Plaintiffs' children have been referred to by name in the Report of the Committee on the District of Columbia of the U.S. House of Representatives entitled "Investigation and Study of the Public School System of the District of Columbia" (hereinafter, the Report). Plaintiffs sue on their own behalf, on behalf of their minor children, and on behalf of a class composed of all students in the District of Columbia schools and their parents. Upon information and belief, all plaintiffs are Black and are of low or moderate income. Plaintiffs bring this action pursuant to Rule 23 of the Federal Procedure on behalf of themselves an all persons constituting the above class who are similarly situated. The persons in the class are so numerous that joinder of all members is impractical; there are questions of law or fact comomn to the class, the claims of the representative parties will fairly and adequately protect the interest of the class; the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with regard to individual members of the class and would as a practical matter be dispositive of the similar claims of other members not parties to the adjudication; the questions of law or fact are common to the members;

and a class action is superior to other available methods to the fair and efficient adjudication of the controversy.

III. *Defendants*

(4) The defendants in this action are:

(a) John L. McMillan, who, as Chairman of the Committee on the District of Columbia of the United States House of Representatives, (hereinafter, the Committee), is responsible for all activities of the committee and its staff.

(b) Thomas G. Abernethy, William L. Dawson, John Dowdy, Charles C. Diggs, Jr., G. Elliott Hagan, Don Fuqua, Donald M. Fraser, Brock Adams, Andrew Jacobs, Peter N. Kyros, William L. Hungate, Earle Cabell, Ray Blanton, Ancher Nelsen, William L. Springer, Alvin E. O'Konski, William H. Harsha, Joel T. Broyhill, Larry Winn, Gilbert Gude, Lawrence J. Hogan, Vernon W. Thompson, Henry P. Smith, Earl F. Landgrebe, who are members of the committee.

(c) James T. Clark, who, as Clerk of the Committee, is in charge of its staff operations.

(d) Clayton S. Gasque, who, as Staff Director of the Committee, is also responsible for its operations.

(e) Hayden S. Garber, who, as Counsel to the Committee, is responsible for legal advice to the Committee.

(f) Paul Yates Little, who, as consultant to the Committee, is responsible for the investigation which led to the report complained of herein and prepared said report.

(g) Louis Martin, who, as a sargent of the D.C. Metropolitan Police Department, and, as an investigator of the Committee, conducted the investigations which were used in the report complained of herein.

(h) Robert E. King, who, as Superintent of Documents, is responsible for the printing and distribution of Congressional reports.

(i) Nicholas A. Spence, who, as Public Printer, is responsible for the printing and distribution of Congressional reports.

(j) Anita Ford Allen, who, as President of the Board of Education of the District of Columbia, is responsible for the operations of said Board.

(k) James C. Coates, Muriel M. Alexander, Charles I. Cassell, Edward Hancock, Nelson C. Roots, Albert Rosenfield, Martha S. Swaim, Mattie G. Taylor, Bardyl R. Tirana and Evie M. Washington, who, as members of the Board of Education of the District of Columbia, participate in the decisions of the School Board establishing school policy and governing the conduct of all employees of the school system.

(l) Hugh Scott, who, as Superintendent of the public schools of the District of Columbia is responsivle for the operations of such schools and for the conduct of school employees.

(m) Othiello Savoid, who, as Principal of Jefferson Junior High School, is responsible for the supervision of all teachers and for the maintenance and preservation of records of said school, and for certain actions complained of herein.

(n) Viola M. Irven, who, as a teacher at Jefferson Junior High School, is responsible for certain actions complained of herein.

IV. *Allegations.*

(5) On or about December 16, 1970, defendant members of the United States House of Representatives, authorized to be published and did publish a report entitled "Investigation and Study of the Public School System of the District of Columbia" (House Report No. 91681). Said defendants also caused the report to be distributed to members of the public.

(6) The report included: (1) copies of attendance records of Jefferson Junior High School for several days during 1970 (pages 213 to 223); these lists included the names of numerous students at Jefferson Junior High School whose parents are plaintiffs herein; (2) various test papers carrying the names and grades of students at the Jefferson Junior High School whose parents are plaintiffs herein (pages 224 to 252); and (3) various letters and memoranda regarding alleged disciplinary problems of students at the Jefferson Junior High School, whose parents are plaintiffs herein (pages 256 to 258).

(7) Upon information and belief, on or about April 14, 1970, defendant Savoid gave defendant Martin copies of the disciplinary letters printed in the report and other materials and on or about May 6, 1970, defendant Irven gave defendant Martin copies of the attendance lists, the school test papers also printed in the report and other materials. Upon information and belief, defendants Savoid and Irven were not authorized to release these documents.

(8) Upon information and belief, defendant Martin delivered copies of the said attendance lists, disciplinary letters, test papers and other materials bearing the names of and information about the plaintiffs and their children to defendant Little, who, as a contract consultant to the Committee, was responsible for the preparation of the report. Defendant Little then caused the copies of the papers referred to above to be included in a draft of the report; defendant members of the United States House of Representatives approved said report for publication; defendants Harrison and Buckley and others acting under their supervision, printed the report and caused the report to be distributed to the public; distribution of the report continues to the present.

(9) Upon information and belief, defendant members of the Board of Education and defendant Scott have failed to promulgate and enforce for the District of Columbia School System rules and regulations governing the confidentiality of such school papers as attendance lists, disciplinary letters and memoranda, school test papers and other such school documents, with the result that, depending upon the uncontrolled exercise of discretion by individual members of the school administrative staff and teachers, information regarding students of the District of Columbia schools is, or may be, distributed to members of the public in violation of the students' constitutional rights and their right of privacy.

V. *Causes of Action*

(10) By disclosing, disseminating and publishing the information complained of herein, defendants violated

plaintiffs' rights to confidentiality of information regarding their children and the parent-teacher privilege. Said disclosure and publication has had and will continue to have an immediate and serious detrimental impact upon the psychological make-up and education of the plaintiffs' children, causing said children to lose trust in their teachers and their schools and creating, through a nation-wide disclosure of adverse information about them, a chilling effect upon the exercise of plaintiffs' children's rights to freedom of speech and association. Said disclosure of information regarding plaintiffs' children by Congressional defendants was wholly devoid of any valid legislative purpose.

(11) Plaintiffs incorporate the foregoing allegations contained in paragraphs one through nine and allege that defendants' publication of attendance or absentee lists bearing plaintiffs' children's names, letters and memoranda bearing plaintiffs' names and plaintiff's children's names regarding alleged disciplinary problems caused by them, and test papers bearing their children's names and grades, has caused and will continue to cause grave damage to plaintiffs' and their children's mental and physical health, their reputations and good name, and their children's future careers so as to damage their education and future employment.

(12) By their conduct, defendants have unjustly caused plaintiffs and their children, to suffer grave damage to their mental and physical health, their reputations and good name, and their future careers; defendants committed the above acts intentionally and with knowledge that the publication of the information referred to above would have an adverse impact upon the mental and physical health, reputations, and careers of the plaintiffs and their families.

(13) By their conduct leading to the publication of the items referred to above, defendants Scott, Savoid and Irven violated Section 6 of Chapter XVI of the Rules for the Public Schools of the District of Columbia by the Board of Education for the District of Columbia governing disclosure of school lists and all defendants violated the plaintiffs' and their children's Constitutional rights

and common law rights to privacy and the confidentiality of their school papers; defendants acted willfully, intentionally, and maliciously, with utter disregard for plaintiffs' and their children's rights and with the intention to cause them mental anguish and to damage their reputations and good name and future careers; at no time did plaintiffs or their children authorize or consent to said publications, directly or indirectly.

(14) By their conduct leading to the publication of the items referred to above, defendants Savoid, Irven, Martin, and Little have violated the Civil Rights of the plaintiffs and their children, as guaranteed by the Civil Rights Act of 1871.

(15) Upon information and belief, unless restrained, defendants will continue to distribute and publish information concerning plaintiffs, their children and other students of the District of Columbia schools in a tortuous and illegal manner and will, thereby, cause direct and material irreparable injury to plaintiffs' and their children's mental and physical health, reputation, good name, property, future careers, and relations with other students and their teachers.

(16) Plaintiffs incorporate the foregoing allegations contained in paragraphs one through fourteen and allege that defendants' conduct, as herein alleged, caused them and will continue to cause them to suffer grievious consequences to their mental and physical health, their reputations and good name, and future careers, and, thereby damaged each plaintiff in the amount of $50,000.

(17) Plaintiffs have no remedy as practical and efficient to the ends of justice as injunctive relief, and, unless such relief is granted plaintiffs will suffer irreparable injury.

VI. *Prayer for Relief*

WHEREFORE, plaintiffs respectfully pray that this honorable Court:

1. Declare, adjudge and hold that the publication of the matters complained of above violated plaintiffs' and their children's statutory, regulatory, administrative, common law, and Constitutional rights.

2. Enter an order enjoining the defendants from further publication, dissemination and distribution of said report, containing the information complained of above, and further order said defendants to call back or otherwise obtain copies of previously issued report, to such extent as may be practical, so that the matters complained of may be deleted.

3. Enter an order prohibiting any future disclosure or publication of confidential information regarding attendance or absentee records, disciplinary reports and letters, school test papers and other matters pertaining to, and specifically mentioning plaintiffs and their children by name.

4. Enjoin the defendant members of the District of Columbia School Board to establish rules and regulations regarding the confidentiality of school papers and the right of privacy of students in the schools of the District of Columbia and, *pendente lite*, order the defendant members of the School Board and defendants Scott, Savoid and Irven from disclosing any further information which identifies by name any student of the Jefferson Junior High School, and any other students of the District of Columbia.

5. Award judgment for the plaintiffs individually in the sum of $50,000 as compensatory damages and award judgment for the plaintiffs individually in the sum of $50,000 as punitive damages.

6. Grant such other and further relief as the Court deems just and proper under the circumstances.

PLAINTIFFS DEMAND TRIAL BY JURY.

Respectfully submitted,

/s/ Jean Camper Cahn

/s/ J. Kirkwood White

/s/ Dennis Dutterer
Attorneys for Plaintiffs
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

January 6, 1971

OF COUNSEL:

Jeffrey Fornaciari*
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

CERTIFICATE OF SERVICE

I hereby certify that at approximately 4:00 p.m., Wednesday, January 6, 1971, I telephoned and spoke with Joseph Hannon, Assistant U. S. Attorney, U. S. Courthouse and described the nature of the complaint herein and our intention to seek a temporary restraining order on Thursday, January 7, 1971. Mr. Hannon indicated that he was not authorized to represent the named defendants and that notice to him was not notice to any defendant.

/s/ Dennis A. Dutterer
DENNIS A. DUTTERER
Suite 509
1145 19th Street, NW
Washington, D.C. 20036
833-1700
Attorney for Plaintiffs

* A member of the Bar of the State of New Mexico.

I hereby certify that at approximately 9:15 a.m., on Thursday, January 7, 1971, I telephoned the office of John A. Earnest, Esquire, Assistant Corporation Counsel, D.C., District Building and on learning that he was in conference was transferred to and spoke with his chief assistant, Lymann Umstead, Esquire, Assistant Corporation Counsel, D.C.; I explained the nature of the complaint to Mr. Umstead and indicated that we would file the complaint and seek a temporary restraining order in the late morning, Thursday, January 7, 1971; I caused a copy of the complaint and other papers to be delivered to the Office of Mr. Earnest, Room 310, District Building, at approximately 11:00 a.m., on Thursday, January 7, 1971.

I further certify that at approximately 9:45 a.m., on Thursday, January 7, 1971, I telephoned and spoke with Hayden Garber, Esquire, Counsel of the House Committee on the District of Columbia, Longworth Building, and explained the nature of the complaint, the relief sought against the Congressional Defendants and our intention to seek a temporary restraining order on Thursday, January 7, 1971; Mr. Garber stated that he was not authorized to represent the Committee members in the absence of instructions from the Chairman.

I further certify that at approximately 10:00 a.m., on Thursday, January 7, 1971, I called the office of the Honorable John L. McMillan in Florence, South Carolina, and spoke with Mr. McMillan's secretary, explaining the nature of the complaint, the relief sought against the Congressional Defendants and our intention to seek a temporary restraining order on Thursday, January 1, 1971; I suggested to Mr. McMillan's secretary that if the Congressman wished to be represented at any Court hearing herein that he might wish to call the U.S. Attorney's Office in Washington, D.C.

I further certify that at approximately 10:15 a.m., I called and spoke with Joseph Hannon, Esquire, Assistant U. S. Attorney and repeated our intention to seek a temporary restraining order on Thursday, January 7, 1971 and I further indicated that I had called Mr. Garber and Congressman McMillian's office in Florence, South

Carolina. Mr. Hannon stated that he was not authorized to represent any of the defendants; I caused a courtsey copy of the complaint and supporting papers to be hand delivered to Mr. Hannon's office, Room 2439, U. S. Court House at approximately 11:30 a.m., Thursday, January 7, 1971.

/s/ J. Kirkwood White
Suite 509
1145 19th Street, NW
Washington, D.C. 20036
833-1700
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER—Filed January 8, 1971

Plaintiffs respectfully move the Court for a temporary restraining order enjoining defendants and their agents, servants, employees and attorneys, and any persons acting in active concert with them, from directly or indirectly (a) seeking or permitting further distribution of a report entitled "Investigation and Study of the Public School System of the District of Columbia" so long as said report includes the names of Plaintiffs' children and other school children of the Jefferson Junior High School and other schools of the District of Columbia on attendance sheets, letters and other memoranda regarding disciplinary matters and test papers and other confidential information; and (b) from seeking or permitting further public dissemination or publication of information regarding the attendance records, disciplinary records and letters and other memoranda regarding disciplinary matters and school test papers of students of the Jefferson Junior High School and other schools of the District of Columbia. Plaintiffs respectfully request that the temporary restraining order specifically include all Defendants including the named members of Congress except to the extent that Article I, Section 6 of the United States Constitution confers immunity to said Members with respect to their speeches on the floor of the House of Representatives and extension of their remarks in the Congressional Record.

The grounds for this Motion are set forth in the Memorandum filed herewith in support of this Motion.

Respectfully submitted,

/s/ Jean Camper Cahn

/s/ J. Kirkwood White

/s/ Dennis Dutterer
Attorneys for Plaintiffs
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

OF COUNSEL:

Jeffrey Fornaciari*
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

* A member of the Bar of the State of New Mexico.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION— Filed January 8, 1971

Plaintiffs respectfully move the Court for a preliminary injunction enjoining Defendants and their agents, servants, employees and attorneys, and any persons acting in active concert with them, from directly or indirectly (a) seeking or permitting further distribution of a report entitled "Investigation and Study of the Public School System of the District of Columbia" so long as said report includes the names of Plaintiffs' children and other school children of the Jefferson Junior High School and other schools of the District of Columbia on attendance sheets, letters and other memoranda regarding disciplinary matters and test papers and other confidential information; and (b) from seeking or permitting further public dissemination or publication of information regarding the attendance records, disciplinary records and letters and other memoranda regarding disciplinary matters and school test papers of students of the Jefferson Junior High School and other schools of the District of Columbia. Plaintiffs respectfully request that the preliminary injunction specifically include all Defendants including the named members of Congress except to the extent that Article I, Section 6 of the United States Constitution confers immunity to said Members with respect to their speeches on the floor of the House of Representatives and extension of their remarks in the Congressional Record.

The grounds for this Motion are set forth in the Memorandum filed herewith in support of this Motion.

Respectfully submitted,

/s/ Jean Camper Cahn

/s/ J. Kirkwood White

/s/ Dennis Dutterer
Attorneys for Plaintiffs
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

OF COUNSEL:

Jeffrey Fornaciari*
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

* A member of the Bar of the State of New Mexico.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 56-71

JOHN DOE, BY HIS GUARDIAN MARY DOE, ET AL,
PLAINTIFFS

vs

JOHN L. MCMILLAN, ET AL, DEFENDANTS

Friday, January 8, 1971

The above-entitled cause came on for hearing on Motion for Temporary Restraining Order, before THE HONORABLE JOHN J. SIRICA, at 4:30 pm.

APPEARANCES:

On Behalf of the Plaintiffs:

J. KIRKWOOD WHITE, Esq.
DENNIS DUTTERER, Esq.

On Behalf of the Defendants:

JOSEPH M. HANNON, Ass't. U.S. Attorney
THOMAS NEDRICH, Esq., Ass't. Corp. Counsel,
District of Columbia

[fol. 2]

PROCEEDINGS

THE COURT: Is counsel for the government present?

MR. HANNON: Your Honor, I note the United States of America is named a party defendant in this action. Up until now I had not noticed that, I thought I was here merely as amicus and am now here in the capacity as representing the United States.

THE COURT: Anyone else representing the parties? I think the Corporation Counsel knew about this case, didn't he?

MR. WHITE: Yes, Your Honor.

THE COURT: We waited since 3:00 o'clock for him, haven't we? I think we ought to proceed.

MR. WHITE: Thank you, Your Honor. I appreciate your scheduling this this afternoon.

Your Honor, this is plaintiffs' application for a temporary restraining order. The matter complained of in the suit and one of the matters sought to be restrained is a Report of the House District Committee which includes in it three categories of material which we submit in the complaint injure the plaintiffs and continues to injure them.

First of all, the report is entitled Investigation and Study of the Public School System of the District of Columbia.

In the report—and I have a copy of the report for the Court (handed to the Court)—the page numbers are [fol. 3] referred to in the complaint.

THE COURT: This report, I think, is a result of a hearing conducted by this committee involved in this case?

MR. WHITE: That is correct, Your Honor.

THE COURT: Testimony was taken in open session?

MR. WHITE: The testimony was taken in open session. As a matter of fact, however, the materials that we complain of which run from page 213 through to page 252, and on page 256 through page 258 were obtained by the committee by an investigation.

THE COURT: What was the purpose of the investigation?

MR. WHITE: Your Honor, the purpose as stated in the text of the report and in the letter of transmittal from Congressman McMillan to Congressman McCormack was to study and investigate the organization, management, and operations of any department of the District of Columbia government, and in this case was the District of Columbia school system.

As we allege in the complaint, the matters that I refer to, the page numbers, were obtained by a District police officer on assignment to the House District Committee from personnel of the District of Columbia schools and was caused to be included in the report by the committee.

We seek to enjoin further publication of the report with those matters in it.

THE COURT: Hasn't there been some publication of this report, or these reports?

[fol. 4] MR. WHITE: Yes, sir, there has.

THE COURT: How many reports have been published?

MR. WHITE: We don't know.

THE COURT: Many I suppose.

MR. WHITE: Probably so. We don't know the number.

THE COURT: What you are seeking to do is prevent further publication of this report?

MR. WHITE: That is correct, Your Honor, so long as it retains within it the matters which we explain—

THE COURT: —I might save you time. I read your complaint in this case, and memorandum of authorities, and I understand what the issue is.

You want this Court to enjoin the Public Printer, I suppose?

MR. WHITE: That is correct, sir.

THE COURT: From publishing this report.

MR. WHITE: Yes, sir.

THE COURT: Under what authority does this Court have the right to do that?

MR. WHITE: Your Honor, we allege a breach of Constitutional right in this case. The right being the right of privacy as enumerated in *Griswald* vs *Connecticut*. The right of privacy having been invaded, the Constitutional right of plaintiffs having been damaged, would give the Court authority to enjoin further injury to plaintiffs under this abridgement of Constitutional [fol. 5] right, particularly also the Civil Rights Act of 1871, which is 42 U.S.C. 1983.

THE COURT: Excuse me. Let the record show a representative is here from the Corporation Counsel's Office. Will you give your name for the record, please?

(entered courtroom)

MR. NEDRICH: Thomas R. Nedrich, Assistant Corporation Counsel for the District of Columbia.

THE COURT: Thank you, sir.

MR. WHITE: In our memorandum, Your Honor, on page 4, we include a discussion of the obviously troubling issue of whether or not the Speech and Debate Clause, Article I, Section 6 of the Constitution reaches the issue we present.

We run through the cases of *Powell* vs *McCormack*, and one coming since then, *Stamler* vs. *Willis*, et cetera.

We refer Your Honor to the decision of Judge Gesell in *Nat Hentoff* vs *Ichord* which that Court enjoined the Public Printer and Superintendent of Documents from printing and distributing the list of alleged radicals.

The discussion by Judge Gesell of the issues in that case indicate that this Court has the power to reach those officials and enjoin them from actions which would invade the rights, particularly the First Amendment rights in that case, of the plaintiffs.

The cases we believe to be controlling in addition to *Powell* vs *McCormack* are *Dombrowski* vs *Pfister; Dombrowski* vs *Eastland*, and a case—

[fol. 6] THE COURT: —that case against Senator Eastland involved issuance of subpoenas.

MR. WHITE: Yes, Your Honor.

THE COURT: Why is that analogous to this case?

MR. WHITE: That case involved as a matter additionally a tort claim against the respondent, chief counsel of the committee Mr. Sourwine, for tort allegedly committed against the plaintiff. The Court was very careful to point out that although the doctrine of congressional immunity is less absolute, although applicable when applied to officers who are employees of the legislative body rather than legislators themselves. The Court was very careful to indicate the dismissal of that action was wrong and it should be returned for a hearing on the merits. So the Court carved out a distinction between the congressional members and persons serving under them who are employees of the Legislative Branch which presumably would include the Public Printer and Superintendent of Documents.

I believe the rule of law that governs here, the test which appears to be emerging from the cases is whether

or not the congressional activity, and we are not talking here about debates on the floor or Congressional Record, is personally valid to legislative purpose. And if it is not, and there is infringement of Constitutional rights, First Amendment, then it would be appropriate for the Court to enter this area and enjoin the activity which is complained of.

[fol. 7] We allege in our memorandum that there is no valid legislative purpose for the inclusion of these materials in the Report. Let me discuss that briefly, if I may.

It is not our contention that any of the conclusionary matters stated in the Report, text of the Report, as to anything the Report found as a result of its investigations and hearings it conducted that we have any right or interest in enjoining those matters. It is not for us to be concerned with that. It is purely a legislative function. It is only where, and I have given the Court the page numbers we are concerned with, particularly where the committees included within the document actual test papers of students, actual absentee lists of students, and actual letters of disciplinary allegations to the parents, or memoranda within the school system. We submit in the brief and memorandum of authorities those matters are confidential and that their spreading upon the record is likely to and will have a chilling effect in the exercise of First Amendment rights of students, and I don't mean to be facetious, but it may sound somewhat odd to be talking about Fifth Amendment rights of students because it is a much different thing when we are talking about the Nat Hentoff and other people. But you see, mentioning now the way the case arose, but the parents took the child, following the publication without her knowledge of it, to a social worker in southwest which is interesting in itself in the sense the parent was suffi-
[fol. 8] ciently concerned with the student's mental balance as a result of that publication to seek counseling service, and as a matter of fact we allege this would impinge on their ability to speak out in class, to perform the things a student should have the right to do without being harassed or intimidate.

So we submit the inclusion of those matters is not a matter of valid legislative purpose. Certainly Congress can review and perhaps even see such documents. We don't for a moment concede that point, but assuming they could see them and extrapolate from them and write a report and summarize findings. We do challenge the case. That is what it is all about. The inclusion of those matters in the record.

As I say, the analogy to the case of *Hentoff* vs *Ichord* I believe is very clear. It is a very similar kind of case, although in Ichord the matter had not been printed. In this case it has been and we merely seek to hold it back.

I would suggest we meet the criteria for a Temporary Restraining Order set forth in the Green case in our memorandum and I needn't belabor those points since Your Honor has been over the papers. The issue is obviously very substantial in terms of the injuries of the parents and the children.

THE COURT: I take it you have a similar issue to the issue involved in the case which was decided by Judge Gesell?

MR. WHITE: That is correct, Your Honor. It does [fol. 9] involve an injunction of the Printer and Superintendent of Documents from distributing materials. We are not, as I said previously, concerned to enjoin the full report, merely that report with the complained of matters in it. If they excise those matters at this point we would be satisfied and have nothing further to seek as to relief as to those defendants.

The probability of success of the other matters we briefed, and I don't see any need to burden the Court with discussion of those cases, the common law right to privacy, the parent, the teacher and student privilege which is not a judicial recognized privilege but one we believe requires some protection. We see little, if any, permanent injury done to defendants if Your Honor is to grant preliminary relief in the temporary restraining order. Simply, they'd be held back from distributing that in the public domain. They of course have copies for their own use, we do not seek the Court holding

them back from reading their own report but simply to not let it go out further so there is further damages.

We also submit that there is a clear public interest involved here and that is the interest of the parents and students and I need not belabor that.

I might refer again as the power of the Court to protect the Constitutional rights of the citizens and enjoin the legislative official, not the congressman necessarily, but the operatives of the Congress.

[fol. 10] The case of Stamler vs Willis notes in the text of the opinion, which is at 1370 of the Federal Reporter:

> "Congress has no more right, whether through legislation or investigations conducted under an overbroadening . . . to abridge the First Amendment freedoms of the people than do other branches of government for free expansion of transcendant value to all society and not merely to those exercising those rights might be the loser."

Quotes from *Dombrowski* vs *Pfister*.

THE COURT: Let me ask you a question. If the Court decides that this committee has a valid and proper legislative purpose in conducting this hearing, even assuming for the purpose of argument that by publishing these names it might cause some embarrassment or damage to the persons mentioned, does this Court have the right to enjoin the Public Printer, or the Printer rather, from publishing and distributing this record which is based upon open hearings in the House? Do I have that right?

MR. WHITE: Yes, Your Honor.

THE COURT: By what authority? What law?

MR. WHITE: Let me clear up a factual issue, if I may.

The matters complained of, those reports, school papers, letters and lists were not obtained through hearings, they were obtained through an investigation which involved sending people to the schools and talking to the teachers, etc., so it didn't come out at hearings. These were sub-
[fol. 11] mitted and included in the record. These were

obtained through investigation and not through use of subpoena power, so it is not a question of whether this matter came voluntarily from the students or parents, or even an authorized overall school official, or District officer. They came apparently through, we would allege, clandestine or semi-clandestine ways. There is, of course, no statute that says the United States District Court Judge may enjoin the committee, or any officer of the Legislative Branch. Certainly not. We submit it is the inherent powers of the Court to protect the Constitutional right of the citizens, and the cases I believe support us on this matter, that that is where the power derives and I believe that is where Judge Gesell saw the power.

As I say, we allege in our complaint in this jurisdiction, the Civil Rights Act of 1871, that no person shall deprive another under color of state law of a civil right or right under the Constitution or statutes of the United States.

So it is not a matter of statute, of course, that grants the Court jurisdiction. The only statute on the subject in this jurisdiction would be our local jurisdiction on equity which is 11 D.C. Code 521, I think it is.

THE COURT: As I understand your argument, you are asking this Court to do precisely the same thing Judge Gesell did?

[fol. 12] MR. WHITE: I believe I'd have to say that is correct, Your Honor, because the effect of the order would be to enjoin the Printer and the Superintendent of Documents from further distribution of the report with the matters complained of in it.

THE COURT: Suppose this Court doesn't agree with Judge Gesell? I am not bound by his decision, I am only bound by the Court of Appeals decision and the Supreme Court.

MR. WHITE: I agree, Your Honor. I say simply that the authorities that Judge Gesell relied upon appear to be in support of his position. I only submit his position as persuasive as Your Honor points out does not bind you.

THE COURT: I understand your point. Who wants to speak next?

MR. HANNON: If the Court please, up until a few moments ago I had been under the impression that my appearance in this case was solely as amicus, but I see that my brothers, counsel for plaintiffs, named the United States of America as defendant to this action and I would conclude that the United States of America as defendant is sufficiently broad to encompass the Legislative Branch of our government.

If Your Honor please, I recall a number of years ago where plaintiffs came into this court and sought a temporary restraining order against the then House Un-American Activities Committee which is now the House Internal Security Committee, and was argued before one of your brother judges. I represented the Committee [fol. 13] at that time and argued as vigorously as I could the case law then in existence, and tried to persuade him this Court had no jurisdiction to enjoin legislative functions and he differed with me and granted the restraining order, and we were in the Court of Appeals that night, Your Honor, about 11:30, and by 8:00 o'clock in the morning had overturned his ruling.

I often asked myself subsequent to that time whether it was because of some remission in my part that something I did not tell that judge, some failure on my part that caused him to do what he did do.

I recently had the experience of appearing before Judge Gesell in connection with this Hentoff case which my brothers rely, and I argued against the temporary restraining order that issued in that case, Your Honor, and I wondered after he granted the temporary restraining order whether again by virtue of some failure on my part I failed to persuade him this Court had no jurisdiction whatsoever to do what he did in that case. And now I find myself again before Your Honor representing the United States of America and the Legislative Branch, compelled to argue once again that the fundamental doctrine of separation of powers prohibits this Court from doing what you are asked to do here.

I want to talk, if Your Honor please, about Judge Gesell's case because I differ with him. I have great

respect for him but I differ strongly with what he did in that case.

[fol. 14] The argument before Judge Gesell was made that publication of this list of speakers that have been going throughout the campuses of the United States and speaking, that the publication of that list identifying those speakers in some respect would chill their First Amendment rights, and that a chilling effect on the exercise of First Amendment rights purportedly is sufficient to give a Court of equity jurisdiction to enjoin a congressional function and that is not so. And *Dombrowski* vs. *Pfister*, the Supreme Court case, does not stand for that because the Supreme Court made it clear the chilling effect together with the course of conduct on the part of state officials which clearly indicated those people involved in that case could not get a fair trial in a criminal case, that that was the irreparable injury, the two coupled together.

Judge Gesell was of the view that chilling effect alone was enough to warrant equity intervention. He did it in two cases. He did it in another case involving the Post Office Department in which he sat as one of a three-judge court.

I say with all due deference to him, if Your Honor please, that even Judge Bazelon in the case involving Selective Service and General Hershey has said chilling effect alone is not enough, you have to look to see what the impact of that chilling effect is before you decide whether or not equity should intervene.

[fol. 15] Now there were two cases argued to Judge Gesell, both of them in this jurisdiction and both of which say this Court may not do what he did, and one of them is *Methodist Federation* vs *Senator Eastland*, and the other is *Black* vs *Hirst*.

Judge Gesell for reasons best known to him concluded since they were old cases, albeit one of them was decided by our Court of Appeals and the other was a three-judge court, that since they were old cases the passage of time had somehow overturned the ruling in those cases. And I respectfully say to Your Honor that that is not so, those cases are the law today in this circuit just as they were when written.

I want to tell Your Honor if I may, please, with respect to *Methodist Federation*—it is reported at 141 F.Supp. 729. And in that case, if Your Honor please, that was a three-judge court case, Methodist Federation social acts against Eastland, the three-judge court said: "Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether it is dematory or not and whether or not it is made after fair hearing. Similarly nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement."

Then the Court continued and said: "We have no authority to prevent Congress or any committee or public [fol. 16] officer acting in the express direction of Congress from publishing a document than to prevent them from publishing the Congressional Record."

That is still the law in this jurisdiction, if Your Honor please.

The Supreme Court said in *Kilburn* vs *Thompson*, an old case, 1880, but still the law:

> "It would be a narrow view of the Constitutional provision," —relating to the Speech and Debate Clause— "to limit it to words spoken in debate. The reason of the rule is as forceable in its application to written reports presented in that body by its committees to resolutions offered which though in writing must be reproduced in speech, and to the act of voting whether it is done vocally or by passage between the tellers. In short, to things generally done in the House by one of its members in relation to the business before it."

Then again in Kilburn the Court said:

> "It would be a narrow view to confine the protection of the Speech and Debate Clause to words spoken in debate, committee reports, resolutions, any act of voting are equally covered as 'things generally

done in session of the House by one of its members in relation to the business before it.' "

[fol. 17] If Your Honor please, in *Hirst* vs *Black*, which was the United States Conrt of Appeals for this circuit, 66 App. D.C. 313, 87 F.2d 68, the Court there said, if Your Honor please:

"The universal rule so far as we know it is that the legislative discretion and discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference. The Constitution has lodge the legislative power in the Congress. If a Court can say to the Congress that it could use or could not use information in its possession the independence of the legislation would be destroyed and the constitutional separation of powers of government invaded. Nother is better settled than that each of the three great departments of government shall be independent and not subject to the control directly or indirectly by either of the others. This separation and consequent exclusive character of the powers conferred upon each of the three departments is basic and vital, not merely a matter of government mechanism."

Now, if Your Honor please, I argued these cases to Judge Gesell and they were argued again when the motion for preliminary injunction was heard and the case disposed of on the merits. And when I argued before him I told him, Your Honor, as I tell you, that one of the great responsibilities of the three branches of this government is to avoid confrontation in issues spelled [fol. 18] out in Separation of Powers Doctrine. And I told him that if he granted the restraining order in that case because of socalled chilling effect on First Amendment rights, he would bring about this confrontation.

Now I have submitted to Your Honor—I should say more appropriately, the House Internal Securities Committee has filed with the Clerk of this Court a copy of House Resolution 1306. And in that House Resolution the House of Representative ordered the Public Printer

to do what Judge Gesell ordered him not to do. He has done it. He has printed the Report that the Judge ordered not be printed, and it has been distributed.

The House of Representatives in that House Resolution has in effect said to Judge Gesell: We now enjoin you from arresting the Public Printer in order to enforce your decree that you entered against him.

And so for the first time to my knowledge in the history of American jurisprudence, if Your Honor please, we have confrontation between the Judiciary and the Congress of the United States, a terribly, terribly unfortunate circumstance, in my judgment.

Now, what is it that impelled Judge Gesell to do what he did in that case? I read his opinion, if Your Honor please. Judge Gesell was of the view that the House Internal Security Committee in the Hentoff case was publishing the list of speakers that has gone around to the nation's campuses speaking, publishing the list [fol. 19] for no legitimate, legislative purpose. Query? Does he have a right in the first instance to determine whether for example it is necessary and proper in accordance with the Speech and Debate Clause for the Congress to inform itself as to who the speakers are when it puts their names in this Report? I respectfully suggest he does not. But nonetheless, he was of the view that there was no legitimate legislative purpose involved in the issuance of that House Committee Report, and he said in effect, that the list of names were being published for the sake of exposure and intimidation, and that purpose only. And for that reason he said he was going to enter a restraining order enjoining the publication of the list of names which has since been published and republished.

So where are we, if Your Honor please, in connection with this case? Judge Gesell said in the Hentoff case: no legitimate legislative purpose; he could discern none. But any student of constitutional law, if Your Honor please, has no difficulty in understanding that the Congress of the United States has the exclusive Constitutional power to legislate for the District of Columbia

government; they are the exclusive legislative body for the District of Columbia.

To say the Congress of the United States cannot conduct a hearing into how the school system in the District of Columbia is being operated is a fabrication on its face, if Your Honor please. The legislative purpose in [fol. 20] conducting this hearing by this committee is obvious on its face.

And so as contrasted from the Hentoff case where Judge Gesell said no legislative purpose, my brothers can't represent to this Court that this committee, the House District Committee, had no legislative purpose in mind when it conducted its inquiry with respect to the District of Columbia school system because obviously it did.

And so there was a genuine legitimate, legislative purpose the responsibility of this Court ends at that line. You go no farther, Your Honor, if you are satisfied legitimate, legislative purpose, you stop there.

And I suggest what they are saying to the Court, and they are free to say it if that is their opinion, that they are quarreling with the prudence, the wisdom, and judgment of the committee in identifying students by name. But that is all they are doing. That is not illegality, that is prudence. They are challenging the prudence of the committee in doing what it does, and it hardly give this Court jurisdiction to enter the type of restraining order that they are asking here.

So I respectfully urge Your Honor to deny the temporary restraining order that they seek here.

THE COURT: Counsel, do you want to say anything on behalf of the District?

MR. NEDRICH: Very briefly, Your Honor.

If Your Honor would take a moment to look at this [fol. 21] matter which I hand up (handed to the Court). Your Honor, this is a resolution proposed by the Superintendent of Schools of the District of Columbia to the Board of Education of the District of Columbia Rules Committee.

I was in attendance of the Rules Committee meeting Monday night when this document was proposed, and is

being modified now and the Rules Committee already adopted the substance of the document.

Commenting briefly on it, I do not think at this point really local legal matters anyone has aroused so much controversy over the last several months as the one involving the publication of these children's names. The School Board and the school administration are most concerned about this.

THE COURT: Excuse me. Make this part of the record. (referring to document handed to the Court)

MR. NEDRICH: Your Honor, I will offer it as District Defendant's Exhibit "A".

THE COURT: Very well.

MR. NEDRICH: The School Board and school administration are most concerned about this matter and are taking appropriate steps to cure the matter. There is already in the board rules, rules of the Board of Education of the District of Columbia, a prohibition against releasing what is deemed to be confidential information to members of the public.

[fol. 22] As Mr. Hannon so well pointed out, however, there is very little choice which the District of Columbia school system has with regard to withholding information from members of Congress. Once they get that information we really cannot control what they do with it.

Now, directing myself to point "a" of plaintiffs' motion with regard to this report entitled Investigation and Study of the Public School System of the District of Columbia, I think it seems clear we have nothing to do with that report since we didn't prepare it.

Point "b", from seeking or permitting further public dissemination or publication of information regarding the attendance records, disciplinary records and letters and other memoranda regarding disciplinary matters and school test papers of students of the Jefferson Junior High School and other schools of the District of Columbia.

Your Honor, this is entirely too broad, it is terribly inappropriate. The School Board and school administration are taking steps to insure what they deem to be confidential records of children are not abused. I think

it would have done plaintiff a great deal more credit rather than run immediately to this Court to approach the School Board, or approach the administration and ask them what they intended to do about this rather than try to use a judicial club. They do have responsibilities, [fol. 23] they are aware of their responsibilities, there are other matters of public record, the test scores which were published earlier this week in the Washington Post, are clearly matters of public record; they involve no students' names, however they do classify scores of achivement for reading and mathematics for each of the elementary and secondary schools of the District of Columbia, and the public are entitled to know this information.

I think plaintiffs at least ought to direct itself to a specific point as to what they want to enjoin with regard to the District defendants and see whether or not the District defendants have not through this document indicated that they are already proceeding to do this.

I do not think any relief is necessary from the Court to the plaintiffs at this time, Your Honor.

Thank you.

THE COURT: Do you wish to reply?

MR. WHITE: May I, Your Honor? Thank you.

As to one of the points that counsel for—Federal counsel made, we, contrary to what he says, do not allege there is no legislative purpose to conduct the hearing. Nor that there is no legislative purpose to the publication of the Report. Those are matters within Congress' discretion. We do not seek to have the Court invade that at all.

However, it is the names of the students. It is their test papers. Johnnie Jones got an "F"; Mary Smith got [fol. 24] an "f", etc. We submit has absolutely nothing to do with legislation, absolutely nothing to do. It is just a simple question: Does the Congress have the right to publish a test paper of a student for apparently no reason other than to highlight the fact he or she failed in school? The fact perhaps that other students are failing, or that the level of reading is down—

THE COURT: —wasn't that all part of the investigation to inquire into these matters? Didn't Congress have a right to inquire into these matters you are speaking about through its lawful committee?

MR. WHITE: Certainly. It has every right as Mr. Hannon points out to investigate the District of Columbia schools we have no quibble with that. They may investigate, they may go into the schools and talk to people, perfectly legitimate. We don't question it; it would be fruitless and facetious of us to do that. However, once they have done that we submit they just simply cannot reproduce deflamatory, inflamatory, confidential materials. Letters for instance, from a principal to a parent, saying Mrs. Smith, your daughter today broke a window. No one has adjudicated whether it is true or not. It doesn't really matter whether it is true or not, it is just simply a private matter.

THE COURT: Tell me something: what was the com- [fol. 25] mittee trying to determine as a result of the resolution that authorized the Committee to act? What were they looking into?

MR. WHITE: It is unclear, Your Honor, but let me read—as I understand, the House Resolution that authorized the investigation—

THE COURT: —read the resolution.

MR. WHITE: The special subcommittee—it authorizes the D.C. Committee to conduct a full and complete investigation and study of any department of the District Government. That of course gives the authority—

THE COURT: —that is not the full resolution. You didn't read the whole resolution, the resolution upon which the Committee acted or was organized.

Here is the resolution, I will read it into the record and you correct me if I am in error.

> "Resolved, That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:
>
> "(1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia.

"(2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; and

[fol. 26] "(3) those operations or activities directly affecting the District of Columbia, of any governmental agency or instrumentality operating on a regional basis entirely within the Washington metropolitan area: provided, That the committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.

"For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary . . ."

So it has pretty broad powers, I think.

MR. WHITE: I agree, Your Honor, but if Your Honor would take a look, for instance, at page 228 of the Report. I submit, and this is my opinion, that there is absolutely no legislative purpose in having that page included in that report. I won't mention the names since we are proceeding under fictitious names but for the sake of argument, it is Marie Doe got an "F" on a school paper that apparently had to do with history, had to do something about history of slaves. And date on it is the [fol. 27] 6th of May 1970. I see nothing in that that is in any way related to the resolution you just read. That resolution indicates the Committee can investigate, can subpoena documents, it can compel witnesses, it can go around to the schools as it did. We have no quibble with that, and this is where I disagree with Mr. Hannon, where I agree with Judge Gesell and submit his view is the correct one. He says that nothing that nothing that

they do can be enjoined, basically. Nothing that the Congress does can be enjoined. Judge Gesell says where they invade the Constitutional right they can be enjoined.

Let me make a couple of comments about what Mr. Nedrich mentioned. As Your Honor noted we are also seeking preliminary relief against the District defendants, the School Board and principals involved.

We firmly believe that the breaches of privacy that occurred in connection with this report are so severe that no professions of after-the-fact willingness to take corrective action can protect the rights of these plaintiffs and others in a similar position.

Very simply, Your Honor, it is that school test papers and school disciplinary matters and lists involving absentees have been spread upon the public record. Who is to say that they won't spread upon the public record through newspapers, through whatever now, it is because they say Congress told us to do so but I submit failure [fol. 28] to have rules that tells their personnel what sort of matters are confidential and what not. Failure of this clause of what injury presently exist . . . willingness to change, I think is fine; simply doesn't cure the evil and pernicious nature of the injury that has occurred heretofore, and we submit unless we enjoin it may continue.

THE COURT: All right. Now the Court is ready to rule in this case.

The Plaintiffs in this case seek this Court's determination that the printing of Plaintiffs' names are violation of the Plaintiffs' Constitutional and Common Law rights of privacy. Plaintiffs contend that knowledge of their identity in this case should not be available to the public at large, and were the public record to identify the plaintiffs would no doubt invade the right of privacy that the Plaintiffs are seeking to protect and aggravate the damage of Plaintiffs' reputations already caused by the publication of the report in question.

This is taken verbatim from Plaintiffs' motion for leave to proceed under fictitious names.

The Court in this case finds that the hearings of the Committee had a legitimate and proper legislative purpose, and the publication of the matters complained of did not violate the Plaintiffs' and their children's statutory, regulatory, administrative, Common Law or Constitutional rights.

The Court further finds that there is not a reasonable probability of success on its merits.

[fol. 29] As counsel for the government pointed out, there is involved here a question regarding the separation of powers, and this Court in this Court's opinion has no jurisdiction whatsoever to interfere with the report which is being circulated, published by the Congress, circulated, disseminated by the Printer.

This Court regrets, of course, it has to differ with the Court's colleague, Judge Gesell, a great judge, a trial judge for whom I have the greatest respect and admiration and affection. I do not agree with him. I agree with the arguments advanced by Mr. Hannon representing the government in this case, and also the Corporation Counsel's representative.

We have here three independent, separate parties: Legislative, Executive and Judicial. And this Court, to repeat again, has absolutely no right under the facts in this case to interfere with the functions of the Legislative Branch of the government.

This Court, fortunately, is not bound by the opinion or decision of any District Judge on this Court or any District Judge in this country, and is only bound to follow, and must follow, and I do follow to the best of my ability, the opinions of this Court of Appeals and from time to time other Courts of Appeals of the Federal Judiciary, and of course including the Supreme Court of the United States.

[fol. 30] I find that the issues of the questions raised in this case are frivolous and not substantial. Therefore, the motion for Temporary Restraining Order is denied.

I also call attention to the Resolution that was mentioned by Mr. Hannon which was passed by the House —has not as yet been passed by the Senate, and I will

read it, pages 17 and 18 state—this is known as House Resolution 1306:

"NOW THEREFORE BE IT RESOLVED, That—

(1) In accordance with the Rules of the House of Representatives and the acts of Congress made and provided, the Public Printer and the Superintendent of Documents shall forthwith print, publish, and distribute, and they are hereby ordered forthwith to print, publish, and distribute to and for the use of the House of Representatives, the Committee on Internal Security of said House, and those entitled to receive them, the usual number of copies of the report (No. 91-1732) of said Committee on Internal Security titled, 'Report of Inquiry Concerning Speakers' Honoraria at Colleges and Universities,' which has this day been duly reported to the House.

(2) All persons, whether or not acting under color of office, are hereby advised, ordered, and enjoined to refrain from doing any act, or causing any act to be done, which restrains, delays, inter-
[fol. 31] feres with, obstructs, or prevents the performance of the work ordered to be done by paragraph numbered (1) hereof; and all such persons are further advised, ordered, and enjoined to refrain from molesting, intimidating, damaging, arresting, imprisoning, or punishing any person because of his participation in, or performance of, such work.

(3) Copies of this resolution shall be forthwith furnished by the Clerk of the House to the Public Printer, Superintendent of Documents, and the clerks of the United States District Court and of the United States Court of Appeals for the District of Columbia."

Even though this Resolution has not been enacted into law this Court agrees wholeheartedly with the statements contained therein.

This motion for Temporary Restraining Order is denied.

MR. WHITE: May I ask a question, Your Honor?

THE COURT: Will you please prepare an appropriate order?

MR. HANNON: Yes, sir.

MR. WHITE: Does Your Honor's ruling cover the preliminary injunction?

THE COURT: The complaint is dismissed as being frivolous.

MR. WHITE: The entire case?

[fol. 32] THE COURT: Yes. I thought I covered everything in my oral opinion.

You are all set to now take this case to the Court of Appeals.

MR. WHITE: Thank you, sir. I just wanted to clear it up.

(Adjourned at 5:20 p.m.)

CERTIFICATE

It is certified the foregoing is the official transcript of proceedings indicated.

/s/ Nicholas Sokal
NICHOLAS SOKAL
Official Reporter

Policy Statement Regarding Congressional Inquiries

Due to the numerous Congressional inquiries related to the Public Schools of the District of Columbia, the Board of Education has determined the need to establish certain policies in order to prevent the disclosure of confidential information and reports regarding students and school personnel. It is the view of the Board that there are aspects of the professional relationships of school personnel with students, parents, and community which must be considered privileged and remain confidential. At the same time, the Board recognizes its responsibility to provide the Congress with the information about the conduct of school affairs to which it is legally entitled.

The Board of Education in an effort to provide for the protection of the confidentiality of certain information related to school affairs and to respond appropriately to Congressional inquiries into the conduct of school affairs in the Public Schools of the District of Columbia establishes the following policies with regard to the release of information to the Congress.

1. The names, addresses and other identifying information related to students are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take all necessary steps to insure that the confidentiality of such privileged information is protected when its release may be demeaning or discrediting to a student or group of students.
2. The names, addresses and other identifying information related to teachers or any other school personnel are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take every necessary step to protect the confidentiality of such information when there is any reason to believe that its release may be injurious to any individual or group.

3. The Board of Education and the Superintendent or his designee shall be the only persons authorized to transmit information officially requested by the Congress pertaining to the conduct of school affairs.
4. The Board of Education and the Superintendent or his designee are the only persons authorized to provide official interpretations of Board of Education policy with regard to the release of information to the Congress.

December 23, 1970

[Tendered to the District Court as District Defendants' Exhibit A on January 8, 1971]

UNION CALENDAR No. 812

91st Congress, 2d Session — — House Report No. 91-1681

INVESTIGATION AND STUDY OF THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA

REPORT

OF THE

COMMITTEE ON THE DISTRICT OF COLUMBIA HOUSE OF REPRESENTATIVES

NINETY-FIRST CONGRESS
SECOND SESSION

PURSUANT TO

THE LEGISLATIVE REORGANIZATION ACT OF 1946

[Congressional Emblem]

December 8, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Counsels' Note:

[Pertinent provisions of this Report have been submitted to the Clerk of the Supreme Court with a written request that it be made available for inspection only by Court personnel.]

[H. Res. 76, 91st Cong., 1st sess., agreed to February 5, 1969]

RESOLUTION

Resolved, That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:

(1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia;

(2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; and

(3) those operations or activities directly affecting the District of Columbia, of any governmental agency or instrumentality operating on a regional basis entirely within the Washington metropolitan area: *Provided*, That the committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.

For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated

by him, and may be served by any person designated by such chairman or member.

The committee shall report to the House as soon as practicable during the present Congress the results of its investigation and study together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

Funds authorized are for expenses incurred in the committee's activities within the United States; and, notwithstanding section 1754 of title 22, United States Code, or any other provision of law, local currencies owned by the United States in foreign countries shall not be made available to the Committee on the District of Columbia for expenses of its members or other Members or employees traveling abroad.

Letter of Transmittal

House of Representatives,
Committee on the District of Columbia,
Washington, D.C., December 8, 1970.

Hon. JOHN W. McCORMACK,
Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: There is herewith submitted pursuant to the Legislative Reorganization Act of 1946, an interim report of the Committee on the District of Columbia which was authorized and directed to conduct a full and complete investigation and study of—

(1) the organization, management, operations and administration of any department or agency of the government of the District of Columbia; and

(2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia,

pursuant to the terms of House Resolution 76, 91st Congress, 1st session.

The enclosed report is based upon the hearings and investigations of the Special Select Subcommittee of the Committee on the District of Columbia, which was authorized and directed to devote itself to some of the problems extant in the operations of the Government of the District of Columbia.

This report is a summary of that Subcommittee's investigations and hearings particularly devoted to the public school system of the District of Columbia.

Sincerely yours,

JOHN L. McMILLAN
Member of Congress, Chairman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed Jan. 11, 1971, James F. Davey, Clerk]

[Title Omitted]

ORDER

This cause came on for hearing on January 8, 1971 upon plaintiffs' application for a temporary restraining order and upon consideration of the application, pleadings, exhibits and argument of counsel for plaintiffs, the District of Columbia defendants and the defendant United States of America made in open Court the following appears to the Court:

1. Plaintiffs seek an injunction from this Court that would enjoin the further printing and distribution of the minor plaintiffs' names in a report issued by Committee of the District of Columbia of the United States House of Representatives entitled "Investigation and Study of the Public School System of the District of Columbia" (House Report No. 9-1681). Further, they seek a declaration that this Committee report is violative of their statutory, regulatory, administrative, common law, and constitutional rights.

The Court has examined the Committee report which was furnished as an exhibit. Pursuant to Article I, Section 8, Clause 17 of the United States Constitution Congress has exclusive legislative jurisdiction over the Disgress of Columbia. Under the circumstances the House Committee report as shown by the Committee resolution has a legitimate and proper legislative purpose. This being so, this Court lacks jurisdiction to afford plaintiffs the injunctive relief sought against the Committee of the District of Columbia and its subordinates. The fundamental principle of separation of powers compels this conclusion.

2. With respect to plaintiffs' request for a declaratory judgment that the Committee report violates certain rights of plaintiffs the Court observes that this action as

brought by plaintiffs includes tort claims made against the named federal government defendants, District of Columbia government authorities and the United States of America. Discussing these defendants *seriatim*, it is clear that the complained of actions alleged against the federal-officer defendants were performed by them in the course of their employment as members of the legislative branch of the United States government and under the official immunity doctrine of *Barr* v. *Matteo*, 360 U.S. 564 the acts complained of are absolutely privileged. For this reason the complaint fails to state a claim against the named defendants of the legislative branch of the federal government, and must be dismissed.

3. The named defendants of the District of Columbia government are the individual members of the Board of Education of the District of Columbia government, the Superintendent of the District of Columbia Public Schools, the principal and one teacher of the Jefferson Junior High School. Assuming that the alleged acts set forth in the complaint were in fact committed by the named District of Columbia officials, then it is clear that the acts were discretionary ones and not ministerial. Since a public officer cannot be liable in money damages, even if he acted negligently, so long as the act was discretionary, *Kendall* v. *Stokes*, 1845, 3 How. 87, 98, 44 U.S. 87, 98; *Cooper* v. *O'Connor*, 1938, 66 U.S. App. D.C. 100, 102, 99 F.2d 135, 137; *Tucker* v. *Duke*, 107 U.S. App. D.C. 253, 276 F.2d 499 (1960) the complaint fails to state a claim against these public officials upon which relief can be granted.

4. The last named defendant in the complaint is the United States of America and since plaintiffs cite 28 U.S.C. 1346 in their jurisdictional statement it would appear that the United States is being sued under the Federal Tort Claims Act. Plaintiffs however have not alleged in their complaint as required by Rule 8(a)(1) of the Federal Rules of Civil Procedure exhaustion of the administrative remedy which according to 28 U.S.C. 2675(a) must be asserted against the appropriate federal agency and finally denied before this Court can exercise its jurisdiction over the United States in the context

of this action. Since this Court does not now have jurisdiction over the United States the complaint should be dismissed.

In view of the foregoing it is by the Court this 11th day of January, 1971,

ORDERED that plaintiffs' application for a temporary restraining order be and the same hereby is denied; and it is

FURTHER ORDERED that the complaint be and the same hereby is dismissed as to all defendants.

/s/ John J. Sirica
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing proposed Order has been made upon plaintiffs by mailing a copy thereof to their attorney, J. Kirkwood White, Esquire, Suite 509, 1145 19th Street, N.W., Washington, D.C. 20036, on this 11th day of January, 1971.

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States
Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

NOTICE OF APPEAL—Filed January 12, 1971

Notice is hereby given that John Doe, by his Guardian Mary Doe, and Richard Roe, by his Guardian Mary Roe, on their own behalf and on behalf of all others similarly situated, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order denying preliminary relief and dismissing their Complaint entered in this action on the 11th day of January, 1971, by the Honorable John J. Sirica, United States District Judge.

Date: 11 January, 1971

/s/ Jean Camper Cahn
JEAN CAMPER CAHN

/s/ J. Kirkwood White
J. KIRKWOOD WHITE

/s/ Dennis Dutterer
DENNIS DUTTERER
Attorneys for Plaintiffs
Suite 509
1145 - 19th Street, N.W.
Washington, D.C. 20036
(202) 833-1700

December 23, 1970

JOINT STATEMENT:

Superintendent of D. C. Public Schools, Dr. Hugh J. Scott
/s/ Hugh J. Scott

President of the Board of Education, Mrs. Anita F. Allen
/s/ Anita F. Allen

The District of Columbia Board of Education and the school administration find it difficult to reconcile the recently released Report of the Special Select Subcommittee of the House Committee on the District of Columbia with its avowed intention to hold hearings in an effort to "help" the D. C. Public Schools. We find it totally incomprehensible that a Committee of the Congress of the United States would include in its public report confidential and detrimental material about school children who are named in that report. It is also unbelievable that the Committee would publish reports about pupils without giving these pupils or their parents the right to speak in their own defense.

In terms of the harmful effects of publicity, the Juvenile Courts protect youths charged with serious crimes better than the District Committee protects innocent and conscientious students who attempted to pass a 15-question test and failed.

Both the policy of the Board of Education and administrative practice require that personnel matters related to staff and confidential matters related to pupils be discussed only in closed sessions of the Board. This requirement is based on the law which established the Board of Education, a law enacted by the Congress, which now finds one of its Committees in violation of the letter and spirit of the law providing for an elected Board of Education.

The D. C. Public School System through the Board of Education and administration reaffirms its commitment to protect the confidentiality of personnel matters and to guard against the disclosure of confidential reports about students. In this respect the Board of Education will

adopt necessary amendments to its Rules and the Superintendent will establish corresponding administrative procedures to assure that the unfortunate disclosures do not re-occur.

It is confident that the attitudes toward pupils and personnel which are reflected in the Committee's report are not indicative of the attitude of the total Congress.

The Committee requested the Board of Education to provide legislative recommendations to the Committee which would assist the Board of Education and the school administration in better serving the education needs of our students. A number of legislative recommendations were furnished the Committee during the public hearings. To date we are unaware of a single legislative recommendation being introduced in the House of Representatives, let alone the enactment of any legislation. If the Committee sincerely wants to be helpful, we would urge it to have the legislative recommendations introduced in Congress in January, and promptly enacted.

[Submitted to the United States Court of Appeals for the District of Columbia Circuit during Oral Arguments on Motions for Summary Reversal and Summary Affirmance.]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1970

Civil Action 56-71

[Filed Jan. 14, 1971, United States Court of Appeals for the District of Columbia Circuit, /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL.

Before: Wright and Tamm, Circuit Judges, in Chambers.

ORDER

On consideration of appellants' motion for summary reversal of the District Court's order denying a temporary restraining order and dismissing the complaint, or for injunction pending appeal, and for expedited hearing and consideration thereof, and in order to provide an opportunity for the Court to more fully consider appellants' motion and appellees' response thereto, which is due on or before January 19, 1971, it is

ORDERED by the Court that appellees Robert E. King, Superintendent of Public Documents, and Nicholas A. Spence, Public Printer, be enjoined from further printing and distribution of *Investigation and Study of the Public School System of the District of Columbia, Report of the Committee on the District of Columbia, House of Representatives*, H.R. Rep. No. 91-1681, 91st Cong. 2d Sess. (Dec. 8, 1970), unless references to the names and addresses of students or their parents or guardians, contained in student absentee lists, letters, memoranda and other papers regarding student disciplinary problems and

student test papers which are incorporated in said report, are deleted, until further order of this Court, and it is

FURTHER ORDERED by this Court that appellees Clark, Gasque, Garber and Little, agents of the Committee on the District of Columbia of the House of Representatives, appellees Allen, Coates, Alexander, Cassell, Hancock, Roots, Rosenfield, Swaim, Taylor, Tirana and Washington, President and Members of the Board of Education of the District of Columbia, appellee Scott, Superintendent of the Public Schools of the District of Columbia, appellee Savoid, Principal of Jefferson Junior High School, appellee Irven, teacher at Jefferson Junior High School, and appellee Martin be enjoined from publication and distribution of student absentee lists, letters, memoranda and other papers regarding student disciplinary problems and student test papers, unless such materials contain no reference to the names or addresses of students or their parents or guardians, until further order of this Court.

The foregoing action does not reflect any consideration by this Court of the merits of appellants' motion, but is only intended to preserve the status quo pending the filing of appellees' response to the aforesaid motion and consideration on its merits.

Per Curiam

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027

JOHN DOE, ET AL.

v.

JOHN L. MCMILLAN, ET AL.

On Appellants' Motion for Summary Reversal (or for injunction pending appeal) and on Appellees' Motions for Summary Affirmance

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Decided March 11, 1971

Messrs. J. Kirkwood White and *Dennis Dutterer,* with whom *Mrs. Jean Camper Cahn* was on the pleadings, for appellants.

Mr. David P. Sutton, Assistant Corporation Counsel, D.C., with whom *Messrs. C. Francis Murphy,* Acting Corporation Counsel, and *Richard W. Barton,* Assistant Corporation Counsel, were on the pleadings, for the District of Columbia appellees.

Mr. John A. Terry, Assistant United States Attorney,

with whom *Messrs. Thomas A. Flannery,* United States Attorney, and *Joseph M. Hannon,* Assistant United States Attorney, were on the pleadings, for the Federal appellees.

Before: FAHY, *Senior Circuit Judge,* TAMM and LEVENTHAL, *Circuit Judges.*

Opinion per curiam.
Dissenting opinion filed by TAMM, *Circuit Judge.*

PER CURIAM: Plaintiff-appellants in this case are students at Jefferson Junior High School and their parents. Defendant-appellees are (1) the Chairman and Members of the Committee on the District of Columbia of the House of Representatives, (2) the Clerk, Staff Director, Counsel and a consultant to the Committee, (3) the Superintendent of Public Documents and the Public Printer, *i.e.,* the Government Printing Office, (4) the President and Members of the Board of Education of the District of Columbia, (5) the Superintendent of the Public Schools of the District of Columbia, (6) the Principal of Jefferson Junior High School, (7) a teacher at Jefferson Junior High School, (8) a District of Columbia Police Officer acting as an investigator for the Committee, and (9) the United States.

Appellants brought a class action in the District Court for damages and for an injunction against further publication and distribution of certain school documents identifying them personally. Notably, they sought to enjoin further publication and distribution of a House District Committee Report on the District of Columbia school system containing copies of (1) student absentee lists, (2) letters, memoranda, and other papers regarding student disciplinary problems, and (3) student test papers, because these documents included their names

and addresses.[1] Appellants allege that such publication violates their constitutional right to privacy.

The District Court denied appellants' motion for temporary relief and dismissed their complaint. This appeal followed. Appellants moved for summary reversal or an injunction pending appeal. On January 14, 1971, this Court issued an injunction to preserve the status quo until responses were filed. The order did not enjoin members of the Committee or the United States, but did prohibit the other defendants from any further publication and distribution of such papers, in the Report or otherwise, as long as the papers contained the names and addresses of pupils and parents. The appellees have now responded, and moved for summary affirmance.

This appeal raises difficult questions concerning appellants' claimed right of privacy and the immunity claimed by appellees acting pursuant to the authority of the House District Committee. Summary treatment of these issues would be inappropriate. We therefore deny appellants' motion for summary reversal and appellees' motions for summary affirmance. Instead, we order that the case be set for argument on an expedited basis as soon as possible after the briefs are filed.

With regard to appellants' request for continuation of the injunction pending appeal, the Court is sensitive to the importance of avoiding "needless friction" between the judiciary and the legislature.[2] However, our consti-

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[1] *Investigation and Study of the Public School System of the District of Columbia, Report of the Committee on the District of Columbia, House of Representatives,* H.R. REP. No. 91-1681, 91st Cong., 2d Sess. (Dec. 8, 1970).

[2] *Ansara* v. *Eastland,* No. 24,816 (D.C. Cir., Jan. 11, 1971) (slip opinion at 3). *See also Railroad Comm'n v. Pullman Co.,* 312 U.S. 496, 500 (1941); *Cole* v. *McClellan,* No. 23,424

tutional obligations require us to take into account the claim of irreparable harm caused by continued publication and distribution of the Report containing names and addresses of pupils and parents. Appellants' claim that they will be publicly stigmatized is substantial, and their claim of invasion of constitutional privacy, and lack of proper legislative purpose to warrant such invasion to the extent of broadcasting names and identities, is worthy of serious consideration on the merits. The dimensions of the constitutional issue have been heightened by a recent Supreme Court decision that official publication of a list of names stigmatizing individuals, without notice or hearing, violates due process of law; two Justices concluded that the list constituted a bill of attainder, a point not reached by the majority.[3]

In one respect, we conclude that the injunction previously entered should be modified. The simple fact of a student's absence from public school, like his presence there, is less significant in terms of protected privacy than his performance on a particular test or his disciplinary difficulties. We modify the injunction to permit the publication of names of students absent from school.

The injunction as so modified will be continued in effect pending the expedited litigation. We reiterate that this order does not apply to the Congressmen, and we further stress that it permits the Committee staff and other defendants to participate in publication and distribution of the Report following excision of the names and addresses of particular individuals from test papers and from any references to disciplinary problems. If this

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(D.C. Cir., Nov. 6, 1970) (slip opinion at 4); *Davis* v. *Ichord*, No. 23,426 (D.C. Cir., Aug. 20, 1970) (slip opinion at 19-26) (Leventhal, J., concurring).

[3] *Wisconsin* v. *Constantineau*, 39 U.S.L.W. 4128 (Jan. 19, 1971).

Court ultimately upholds the authority to publish the identities of individuals, they could be added in a supplemental report. The Court has not been advised of an imminent legislative need for the enjoined defendants to participate in immediate publication and distribution of names and addresses. Under the present circumstances, we conclude that continuation of the injunction as modified, pending determination of an expedited appeal, is a responsible exercise of our duties.

So Ordered.

TAMM, *Circuit Judge, dissenting*: I would deny appellant's motion for summary reversal and grant appellee's motion for summary affirmance. In my view, no purpose is served by further delaying a disposition of this cause, albeit it nominally permits the filing of additional briefs which in actuality can only contain material which is repetitious of what is now before us. I see no purpose in now cautiously walking around the quicksand of a separation-of-powers question by delaying a head-on confrontation of the problem. No number of additional briefs or arguments can erase or hide the nature of the problem already briefed and argued before us.

Challenged herein is the publication by the House Committee on the District of Columbia of a report on the school system of the District of Columbia which was issued on December 8, 1970, as "INVESTIGATION AND STUDY OF THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA, REPORT OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA, HOUSE OF REPRESENTATIVES, H.R. REP. No. 91 1681, 91st Cong., 2d Sess." The District Judge properly found that this report had a valid legislative purpose growing out of the legislative power of Congress over the District of Columbia. U.S. CONST. art. I, § 8, cl. 17. The self-stated object of the report is "to give a realistic view of this troubled school, and the lack of administrative efforts to

rectify the multitudinous problems there." Certainly a conscientious Congress, called upon to authorize the expenditure of more than $150,000,000 a year[1] of the taxpayers' money for the operation of a public school system, is justified and required to determine if the school population is receiving full value from this investment.

The challenged report does set out attendance lists, history test papers, and correspondence on disciplinary problems all of which contain the names of students. Certainly these documents constitute the best available evidence of the facts which they portray. Also contained in the report are the oral answers of witnesses before the committee who furnished the names of students participating in and creating disciplinary problems (see page 212 of the report), and yet there appears to be no question raised as to the legality or propriety of this testimony. As a matter of evidentiary appraisal I see no difference in the status of documents containing names of individuals and oral testimony of the same type.

Of major concern to me, however, is the question of what, if any, authority this court has to pass upon the action of Congress in this situation. While I may doubt both the necessity and wisdom of the inclusion of data identifying individual students, I am required by time-tested law to recognize the legality, if not the virginity, of congressional power. My judicial responsibility requires me to validate, when called upon to do so, the legality of congressional action which is within the legislative power as defined by the Constitution and case law. This recognition of the limitations upon judicial interference with the legal actions of the legislative branch has been recognized

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[1] The current press indicates the requested budget for the next fiscal year's operation of the public school system of the District of Columbia exceeds $150,000,000.

since 1805, when Chief Justice Marshall, speaking for the Court in *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 395 (1805), stated: "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution." It is my view that the majority opinion ignores the mandate expressed by Marshall that "to undertake here to inquire into the decree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This Court disclaims all pretensions to such a power." *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 315, 422 (1819). I recognize that "[t]he Government which has the right to do an act, and has imposed on it, the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select *any* appropriate means, *that one particular mode* of *effecting the object* is excepted, take upon themselves the burden of establishing that exception." *McCulloch v. Maryland, supra* at 409. (Emphasis added.) I do not believe the majority opinion establishes any exception applicable to this case. The line of cases supporting this doctrine is too well established to require lengthy citation.

I am, in addition, concerned that the majority predicates its action on an appellant's claimed "right of privacy." It does seem to me that the vagaries created in this area since *New York Times v. Sullivan,* 376 U.S. 254 (1964), establish an emblem of identity as the legal measure of not only the breadth and depth of this "right" but even of its existence in individual cases. A licensed physician and the medical director of a Planned Parenthood League have a right to privacy (*Griswold v. Connecticut,* 381 U.S. 479 (1965)), but an elected county official has no such right. *New York Times v. Sullivan, supra.* I am unable by any amount of legal engineering to perform such a task of con-

stitutional alchemy as to find a legal "right to privacy" in truant school children, but no such right in a United States Senator. *Pearson v. Dodd*, 133 U.S.App.D.C. 279, 410 F.2d 701, *cert. denied*, 395 U.S. 947 (1969).

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1970

Civil 56-71

[Filed Mar. 11, 1971, United States Court of Appeals for the District of Columbia Circuit, /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL.

v.

JOHN L. MCMILLAN, ET AL.

Before: Fahy, Senior Circuit Judge, and Tamm and Leventhal, Circuit Judges

ORDER

This cause came on for consideration on appellants' motion for summary reversal (or for injunction pending appeal) and on appellees' motions for summary affirmance, and the Court heard argument of counsel. On consideration of the foregoing, it is

ORDERED by the Court that the aforesaid motions are denied, and it is

FURTHER ORDERED by the Court that this Court's injunction of January 14, 1971, is modified to permit the publication of names of students absent from school, and the injunction as so modified will be continued in effect pending the expedited litigation, and it is

FURTHER ORDERED by the Court that appellants' brief shall be filed on or before April 12, 1971, appellees' brief and the appendix of the parties shall be filed on or before May 7, 1971, and appellants' reply brief, if any, shall be filed on or before May 14, 1971. Ten copies

of the briefs and seven copies of the appendix of the parties may be filed in Xeroxed form. No extensions of time for the filing of the briefs or appendix will be granted.

The Clerk is directed to schedule this case for argument on the merits as soon after the briefs are filed as the business of the Court will permit.

Per Curiam

Opinion per curiam.
Dissenting opinion by Circuit Judge Tamm.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL

Appeal from the United States District Court
for the District of Columbia

Decided January 20, 1972

Mr. Dennis Dutterer, with whom *Mrs. Jean Camper Cahn* and *Mr. J. Kirkwood White* were on the brief, for appellants.

Mr. David P. Sutton, Assistant Corporation Counsel for District of Columbia, for District of Columbia appellees. *Messrs. C. Francis Murphy,* Corporation Counsel, and *Richard W. Barton,* Assistant Corporation Counsel, also entered appearances for District of Columbia appellees.

Mr. John A. Terry, Assistant United States Attorney, with whom *Messrs. Thomas A. Flannery,* United States Attorney at the time the brief was filed, *Joseph M. Han-*

non, Assistant United States Attorney, *Fred M. Vinson, Jr.*, *William C. Cramer*, *Michael P. Bentzen*, *Sheldon S. Gilbert* and *James M. Robin* were on the brief, for Federal appellees.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and MACKINNON, *Circuit Judges*.

Opinion for the Court filed by MACKINNON, *Circuit Judge*.

Dissenting opinion filed by WRIGHT, Circuit Judge, at p. 29.

MACKINNON, *Circuit Judge*: Plaintiff-appellants in this case are a class of persons composed of students at Jefferson Junior High School in the District of Columbia and their parents and guardians. Defendant-appellees are: (1) The Chairman and Members of the House of Representatives Committee on the District of Columbia[1]; (2) the Clerk, Staff Director, Counsel and a consultant to the Committee; (3) the Superintendent of Public Documents and the Public Printer, *i.e.*, the Government Printing Office; (4) the President and Members of the Board of Education of the District of Columbia; (5) the Superintendent of the Public Schools of the District of Columbia; (6) the Principal of Jefferson Junior High School; (7) a teacher at Jefferson Junior High School; (8) a

[1] Although the complaint initially named all of the Members of the House District Committee as defendants, we subsequently granted appellants' motion to sever Congressmen Brock Adams, Charles C. Diggs, Jr., Donald M. Fraser, Gilbert Gude, and Andrew Jacobs, Jr., and to dismiss this appeal with respect to them. June 7, 1971. The stipulation upon which such dismissal was based, indicated that the above-named Congressmen oppose the distribution of the House Committee Report, so long as the names complained of remain therein, and that they would have voted against the publication thereof had they been given the opportunity to do so.

District of Columbia Police Officer acting as an investigator for the Committee; and (9) the United States of America.

Appellants, proceeding *in forma pauperis* and under fictitious names to preserve their anonymity, commenced this action in the District Court for damages, a declaratory judgment and for an injunction against further publication and distribution of a report of the House of Representatives Committee on the District of Columbia on the District of Columbia School System [2] unless 45

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[2] *Investigation and Study of the Public School System of the District of Columbia* (Report of the Committee on the District of Columbia, House of Representatives), *H.R. Rep. No.* 91-1681, 91st Cong., 2d Sess. (December 8, 1970). This report was prepared pursuant to a House Resolution, H. Res. 76, 91st Cong., 1st Sess. (February 5, 1969), which provides:

> *Resolved,* That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:
>
> (1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia;
>
> (2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; and
>
> (3) those operations or activities directly affecting the District of Columbia, of any governmental agency or instrumentality operating on a regional basis entirely within the Washington metropolitan area: *Provided,* That the Committee shall not undertake any investigation of any subject which is being investigated by any other committee of the House.
>
> For the purpose of carrying out this resolution the committee or subcommittee is authorized . . . to hold such hearings, and to require, by subpoena or otherwise,

pages thereof were altered to delete certain names of students. The pages in question contain copies of: (1) student absentee lists; (2) letters, memoranda, and other papers regarding student disciplinary problems; and (3) student test papers.[3] These documents, which include the true names and addresses of appellants, identify the students in contexts that are, at least partially, derogatory. Appellants contend, *inter alia*, that the disclosure, dissemination, and publication of the House Committee Report, so long as it contains the names of said students, violate their constitutional and common law right to privacy, constitute an impermissible bill of attainder, deny

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the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary . . .

The committee shall report to the House as soon as practicable during the present Congress the results of its investigation and study together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

* * * * * *

Counsel for appellants indicated at oral argument in the District Court that he does not contend that the House District Committee acted pursuant to an invalid legislative purpose in investigating the District of Columbia Public School System and publishing the Report (Tr. 23, 24, 27), but he does seek declaratory and injunctive relief against the Committee as well as others. Art. I, § 8, cl. 17, of the U.S. Constitution vests Congress with the power of "exclusive legislation" over the District of Columbia. *See* note 6, *infra*.

[3] This information was obtained voluntarily from District of Columbia school personnel by House District Committee investigators. Before the District Court below, appellants unsuccessfully sought an injunction against further disclosure of such "confidential information" by District of Columbia school officials.

them due process of law, violate the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), are devoid of any valid legislative purpose, and will cause severe damage to their mental and physical health, their reputations, and appellant-students' future careers. They also make a contention on appeal which was not raised below, namely, that the House Committee Report was published and distributed in violation of House rules.

The District Court denied appellants' motion for temporary relief and dismissed their complaint. It found that the House Committee Report had a "legitimate and proper legislative purpose," as demonstrated by the underlying enabling resolution,[4] and it held that it was without jurisdiction to grant the requested injunctive relief by reason of the doctrine of separation of powers. It further determined that since the acts of the Legislative Branch employees named as defendants were performed by them in the course of their employment, they were absolutely privileged under the doctrine of official immunity. The District of Columbia defendants were found to be protected by the doctrine that a public officer cannot be liable in money damages, even if he has acted negligently, so long as his act was discretionary. Finally, the District Court concluded that it lacked jurisdiction over any claim against the United States, since appellants had not exhausted their other remedies as required by 28 U.S.C. § 2675(a) (1970).[5] This appeal followed.

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[4] H.R. Res. 76, *supra* note 2.

[5] 28 U.S.C. § 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first

Appellants moved this court for summary reversal or an injunction pending appeal. On January 14, 1971, we issued an injunction to preserve the status quo until responses were filed. Such order did not enjoin the Members of the House District Committee or the United States, but it did prohibit the other defendant-appellees from any further publication and distribution of the House Committee Report, so long as it contained the names and addresses of pupils and parents. On March 11, 1971, this court denied appellants' motion for summary reversal, and appellees' motion for summary affirmance, and it modified the injunctive order of January 14, 1971, to permit the publication of names of students absent from school. It otherwise continued the injunction and ordered the case set for argument on an expedited basis.

The issues have now been briefed and argued, and we hold that the District Court's dismissal was proper. For the reasons set out below, we have concluded that the District Court was without jurisdiction with respect to the defendant-appellees. Therefore, we have not found it necessary to consider the merits of the constitutional, statutory, administrative, and common law claims which appellants have asserted.

I

Under Article I, Section 8 of the Constitution, Congress is provided with exclusive legislative authority over the

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presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of

District of Columbia.[6] This pervasive power is accompanied by inherently broad investigatory authority.

> Preliminary inquiry has from the earliest times been considered an essential of the legislative process. By it are to be determined both the advisability for and the content of legislation. So that even as to ordinary subjects, the power of inquiry by the legislature is coextensive with the power of legislation and is not limited to the scope or the content of contemplated legislation. Constitutional legislation might ensue from information derived by an inquiry upon the subject described in the [investigating body's legislative authorization.] That potentiality is the measure of the power of inquiry.

Barsky v. United States, 83 U.S.App.D.C. 127, 131, 167 F.2d 241, 245, *cert. denied,* 334 U.S. 843 (1948). *See Fields v. United States,* 82 U.S.App.D.C. 354, 164 F.2d 97 (1947), and authorities cited therein; *McGrain v. Daugherty,* 273 U.S. 135, 177-179 (1927). "The scope of the power of inquiry, in short, is as penetrating and farreaching as the potential power to enact and appropriate under the Constitution." *Barenblatt v. United States,* 360 U.S. 109, 111 (1959). *See Watkins v. United States,* 354 U.S. 178, 187, 198 (1957).

Civil Procedure by third party complaint, cross-claim, or counterclaim.

Appellants have not challenged the District Court's dismissal of the suit against the United States on appeal.

[6] U.S. CONST. art. I, § 8 provides:

"The Congress shall have Power . . . [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, . . ." *See S.R.A., Inc. v. State of Minn.,* 327 U.S. 558 (1946); *Gudmundson v. Cardillio,* 75 U.S.App.D.C. 230, 126 F.2d 521 (1942); *La Forest v. Board of Commissioners of District of Columbia,* 67 App. D.C. 396, 92 F.2d 547, *cert. denied,* 302 U.S. 760 (1937).

The instant case concerns an investigation of the District of Columbia Public School System which was conducted on behalf of the Committee on the District of Columbia of the House of Representatives, by a Special Select Subcommittee of that House District Committee, under the authority of H.R. Res. 76, 91st Congress, 1st Session.[7] The study probed deeply into a great many problems of the District of Columbia School System. Included were: Administrative Problems, Board of Education of the District of Columbia, Crime in the Schools, D.C. School's Answer to Special Select Subcommittee Questions, Pornography, Revolutionary and other Inflammatory Materials, Damage to Property, Drug Abuse in the Schools, School Budget, Washington Teachers Union, Student Bussing, Student Suspension Policy, Schools without Walls, Open Class Rooms, Open Class Room Concept, Freedom School, Vocational Schools, Student Bill of Rights and Responsibilities and Teacher Comments. A portion of the study related to absenteeism, student discipline, and educational quality. On these matters, the 45 pages from 213-258 set forth for Jefferson Junior High School various absence sheets, lists of class cutters and certain reports and information concerning breaches of discipline and suspension problems. Also included were 19 pages of student test papers for a history examination taken from a fifth grade textbook but given to seventh graders. The average score was "F" and the report was submitted by the teacher to show the poor reading ability of most of her students.

At the conclusion of the investigation, the House Committee issued a 450-page Report, both for the benefit and use of Congress and for the information of the public. The material to which appellants object is only a small part of the entire Report. The Report in its

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[7] *See* note 2, *supra.*

entirety discloses a truly deplorable state of affairs in the public schools of the District of Columbia and obviously one of tremendous congressional concern.[8] Appellants do not challenge the propriety of the investigation or the issuance of the Report generally—*i.e.*, absent the use of their names—nor could they.[9] They only assert a statutory, common law, and constitutional right to anonymity. We need not discuss the merits of appellants' innovative claims, however, since we conclude that all of the defendant-appellees named in the complaint are immune from the suit brought against them.[10]

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[8] For the fiscal year ending June 30, 1970, Congress appropriated $140,386,000 for public education in the District of Columbia (83 Stat. 429). Further evidence of the vital interest of Congress in the current District school situation can be deduced from a letter of the President of the Board of Education appearing at pp. 16-19 of the Report which indicates that a grand total of $10,022,041 in additional appropriations will be needed "to create a safe learning environment for its students as determined by the school administration and the Board of Education."

[9] In light of the vast amount of tax dollars spent annually on public education in the District of Columbia, the great interest of the public in the effectiveness of the District schools is apparent. It must be emphasized that "[t]he effective functioning of a free government like ours depends largely on the force of an informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees." *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (concurring opinion of Black, J.). "The informing function of Congress should be preferred even to its legislative function." *Watkins v. United States*, 354 U.S. 178, 200 & n.33 (1957). The fact that an educational institution was being investigated did not detract from Congress' general authority. *See Barenblatt v. United States*, 360 U.S. 109, 112, 129 (1959).

[10] Appellants have raised an issue, concerning alleged vio-

II

Article I, Section 6 of the Constitution provides that "for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other place." This provision, which was adopted by the Con-

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lations of House Rules, in their appeal brief which was never raised in the District Court. We dismiss this portion of the appeal on the ground that it was not properly asserted below. *Miller v. Avirom*, 127 U.S.App.D.C. 367, 384 F.2d 319 (1967); *United States v. Atkinson*, 297 U.S. 157, 159 (1936); *Johnson v. Reily*, 82 U.S.App.D.C. 6, 7, 160 F.2d 249, 250 (1947); *United States v. U. S. Fidelity & Guaranty Co.*, 236 U.S. 512, 529 (1915); *Williams v. Union Pacific Ry. Co.*, 286 F.2d 50, 55 (9th Cir. 1960); *Burns v. United States*, 274 U.S. 328, 336 (1927). We do not believe that appellants have demonstrated the existence of any exceptional circumstances which might warrant divergence from this general principle. *Compare Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *Morgan v. Garris*, 113 U.S.App.D.C. 222, 223, 307 F.2d 179, 180 (1962) (*en banc*). "This is not a mere technicality but is of substance in the administration of the business of the courts. Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below. Almost every case would in effect be tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved." *Johnson v. Reily, supra*, 82 U.S. App.D.C. at 7, 160 F.2d at 250.

A large part of appellants' argument, which is raised here for the first time, is devoted to the claim that they were entitled under Rule XI, 27(m) of the Rules of the House of Representatives, to have the evidence with respect to them received in executive session. Their argument further assumes that such procedure would have resulted in suppressing disclosure of the statements. However, an express determination by the "Committee" is required before it is necssary to convene an executive session of the Committee and no such determination was here made. Also, it is implicit from a reading of Rule XI, 27(o) that the taking of testimony in

stitutional Convention without debate or opposition,[11] found its roots in the conflict between Parliament and the Crown culminating in the Glorious Revolution of 1688 and the English Bill of Rights of 1689.[12] In light of this

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executive session does *not* automatically result in its suppression. It provides:

> "(o) No evidence or testimony taken in executive session may be released or used in public sessions without the consent of the committee."

Jefferson's Manual and Rules of the House of Representatives, p. 387, 92nd Cong. It thus appears that the Committee may still consent to the release of any such evidence or testimony and to its use in public sessions.

Appellants also contend that under the Rules of the House the Report was improperly released without allowing certain Congressmen to express a minority view. It does appear, however, that some of the Congressmen were orally informed. In any event, the delivery of the Report to the Clerk for printing and reference to the proper calendar under Cl. 2 of Rule XIII were reported in the Congressional Record for December 8, 1970 and the Report was on that date referred to the whole House on the State of the Union and ordered to be printed (116 CONG. REC. 40311). Such points of order must be raised by a member in the House of Representatives and unless done so in timely manner are waived. Appellants thus do not furnish a basis that justifies ordinary judicial intervention.

[11] *See* 5 DEBATES ON THE FEDERAL CONSTITUTION 406 (J. Elliot ed. 1876); 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 246 (M. Farrand rev. ed. 1966).

[12] *See* Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U. L. REV. 1, 3-16 (1968); Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 961-966 (1951).

> It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess. [See Jefferson, Notes on the State of Virginia

history, the Supreme Court concluded in *United States v. Johnson*, 383 U.S. 169, 181 (1966), that the purpose of the Speech or Debate Clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary."

"In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."[13] To accomplish this important objective, the Supreme Court has recognized the necessity for construing the Speech or Debate Clause protection in a broad fashion. *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881); *United States v. Johnson*, 383 U.S. 169, 179-180 (1966). "[I]t would be a 'narrow view' to confine [its] protection . . . to words spoken in debate. *Committee reports*, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.' *Kilbourn v. Thompson, supra*, at 204." *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (emphasis supplied).[14]

(3rd Am. ed. 1801), 174-175.] For the loyalist executive and judiciary had been deposed, and the legislature was supreme in most States during and after the Revolution. "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Madison, The Federalist, No. XLVIII.

Tenney v. Brandhove, 341 U.S. 367, 375 (1951).

[13] 2 Works of James Wilson (Andrews ed. 1896) 38, as quoted in *Tenny v. Brandhove, supra*, 341 U.S. at 373.

[14] The Supreme Court has frequently cited the language of Chief Justice Parsons, of the Massachusetts Supreme Court, in *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), interpreting

The Speech or Debate Clause not only provides a defense on the merits, but it generally protects a legislator from the annoyance of having to devote his time and efforts to defending himself in court. *Powell* v. *McCormack, supra,* 395 U.S. at 502-503. *See Dombrowski v. Eastland,* 387 U.S. 82, 85 (1967).[15] The only question which a trial

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the Massachusetts speech and debate clause, in support of its expansive interpretation rule:

> These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, *to the making of a written report,* and to every other act resulting from the nature, and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. [emphasis supplied]

Tenney v. Brandhove, supra, 367 U.S. at 373-374; *Kilbourn v. Thompson, supra,* 103 U.S. at 203.

[15] The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck,* 6 Cranch

court should consider is "whether from the pleadings it appears that the [legislators] were acting in the sphere of legitimate legislative acitvity." *Tenney v. Brandhove,* 341 U.S. 367, 376 (1951). Since we believe that the activities of the defendant-members of the Committee on the District of Columbia of the House of Representatives "may fairly be deemed within [the Committee's] province," it is clear that the District Court properly dismissed the suit as to them. *Id.,* at 378. *See United States v. Doe,* —— F.2d ——, ——, Nos. 71-1331, -1332, -1335, slip op. at 5-9 (1st Cir. January 7, 1972).

As has been noted, appellants concede the authority of the House District Committee to investigate and report to Congress on the District of Columbia Public School System. They have only questioned the propriety of that small portion of the Committee Report which uses their names in somewhat derogatory contexts. "That the protection of private rights upon occasion involves an invasion of those rights is in theory a paradox, but, in the world as it happens to be, is a realistic problem requiring a practical answer." *Barsky v. United States, supra,* 83 U.S.App.D.C. at 135, 167 F.2d at 249. It is apparent that the House District Committee was faced with a great dilemma. In its effort to expose the vexing problems which adversely affect the District of Columbia School System, with a view toward the alleviation of such problems to the benefit of all school children, the Committee obviously believed that some disclosure which might possibly injure a few pupils was necessary. While there may or may not be any substantial public interest in the test papers, discipline memoranda, or absentee lists

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87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona v. California,* 283 U.S. 423, 455.

Tenney v. Brandhove, supra, 341 U.S. at 377.

themselves, the inclusion of such material in the Committee Report clearly increased its credibility. While some might consider that it was unnecessary to include the names, at a time such as this when "credibility gaps" are frequently mentioned, it was entirely reasonable for the House District Committee to include what it considered to be sufficient factual data to support its findings concerning a controversial and complex area. Delinquency in the District of Columbia Schools is such a problem and in connection with its investigation of the Student Suspension Policy, which it was investigating, Congress had a right to know the precise details of a few particular disciplinary problems involving the discipline of particular students for particular acts committed in the class rooms of the public schools of the District. All the details of such circumstances, including the names of the students involved and their acts were relevant and necessary for a full and proper consideration of the matter. Many of the instances of student delinquency which one hears daily are considered by many to be unbelievable. Others assert they are untrue. Under such circumstances the desire of the Committee to present specific evidence to support its findings is understandable. And the discretion is vested in Congress, not the courts. We must be careful to remember that under such circumstances, "every reasonable indulgence of legality must be accorded to the actions of [the] coordinate branch of our Government" by the judiciary. *Watkins* v. *United States, supra,* 354 U.S. at 204.[16]

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[16] "[I]t does not lie with this Court to say when a congressional committee should be deemed to have acquired sufficient information for its legislative purposes." *Hutcheson v. United States,* 369 U.S. 599, 619 (1962). Similarly, this court should not interpose its judgment for that of a congressional committee with respect to the amount of data required to bolster the credibility and effectiveness of a committee report.

What is really involved here is Congress functioning, as it must with respect to the District of Columbia, as a combination state legislature and education committee that is concerned with a grass roots problem. As with any local school board problem, this involves individuals, administrators, teachers, employees, parents, students and taxpayers. The Report recognizes this and to make its study complete and to give it the maximum credibility, the Report throughout, in hundreds of situations in addition to the students involved in disciplinary problems, has named the persons involved. The Report is replete with names of individuals, groups and organizations, many of which are discussed in connection with highly derogatory conduct. For instance, in reporting on the narcotics situation, names and incidents are recited of employees who were furnishing narcotics to drivers employed by the schools. H.R. Rep. No. 91-1681, 91st Cong., 2d Sess. 109-110 (1970). Appellants are not singled out. They are a minor part of the Report. However, it must be noted that the use of specific names throughout the Report does add considerably to its credibility in an area where reliability is necessary.

"Our function, at this point, is . . . not to pass judgment upon the general wisdom or efficacy of the activities of this Committee in a vexing and complicated field." *Barenblatt* v. *United States, supra,* 360 U.S. at 125. It is merely to determine whether the defendant-legislators were acting within the sphere of their legitimate activity when they collected the information in question and issued the House Committee Report in its present form. Since it is readily apparent that their actions were within the discretionary area of their constitutional authority, the defendant-Representatives are absolutely protected by the Speech or Debate Clause.

III

The legislative immunity provided by the Speech or Debate Clause is not limited to Congressmen, although the doctrine's protection "is less absolute . . . when applied to officers or employees of a legislative body, rather than to legislators themselves." *Dombrowski v. Eastland, supra,* 387 U.S. at 85. *See Tenney v. Brandhove, supra,* 341 U.S. at 378. Therefore, when congressional employees or officers are acting pursuant to valid [17] legislative authorization, in furtherance of a proper legislative purpose, they also come within the scope of the Speech or Debate Clause protection. *See United States v. Doe,* —— F.2d ——, ——, Nos. 71-1331, -1332, -1335, slip op. at 11-13 (1st Cir. January 7, 1972).

There is no contention by appellants that any of the Federal legislative employees named as defendants [18] were acting outside the sphere of their official duties. They merely performed the incidental functions which were necessary to insure the full accomplishment of the House District Committee's appropriate legislative objective. In this day of complex public problems, where assignment of

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[17] *Compare Kilbourn v. Thompson,* 103 U.S. 168 (1881); *Powell v. McCormack,* 395 U.S. 486 (1969); and *Bond v. Floyd,* 385 U.S. 116 (1966), where the underlying authorizations were invalid. Since the House District Committee's enabling resolution was clearly valid, as appellants have conceded, the holdings in these cases are inapposite to the present situation. The scope of the House District Committee's inquiry into the District of Columbia Public School System was properly limited and defined, and no compulsory process was utilized. Thus the rationale of *Watkins v. United States,* 354 U.S. 178 (1957), is not relevant here. *See Hutcheson v. United States,* 369 U.S. 599, 613 n.16, 616 (1962).

[18] These include the Clerk, Staff Director, Counsel, and consultant to the Committee, its investigator, the Superintendent of Public Documents and the Public Printer.

authority by legislators to legislative assistants is an absolute necessity if Congress is to be able to perform its constitutional functions, it would indeed be hollow to afford immunity to the Congressmen, but not to their assistants, for these aides might be hesitant to undertake the full performance of their lawful duties if they had to face the threat of possible lawsuits. Such an inconsistent result would impossibly hinder congressional activities, and effectively prevent the attainment of the objectives underlying the Speech or Debate Clause. We therefore must conclude that the suit against the Federal legislative employees [19] was properly dismissed due to their legislative immunity.

Although we could base our decision regarding the Federal legislative employees wholly on the protection afforded them by the Speech or Debate Clause, an additional consideration further demonstrates why the District Court properly refused to enjoin the publication and distribution of the House Committee Report by them. "If a court could say to the Congress [, and we might add to its authorized agents,] that it could or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either

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[19] Although it might be possible to extend the protection of the Speech or Debate Clause to cover the District of Columbia officials and employees who cooperated with the House District Committee's investigation, we need not reach this complex issue, due to the official immunity doctrine discussed in Part IV of this opinion. The parties have not argued this point, and we believe that its resolution is best left to another time. *Compare United States v. Doe*, —— F.2d ——, ——, Nos. 71-1331, -1332, -1335, slip op. at 12-13 (1st Cir. January 7, 1972).

of the others." *Hearst v. Black,* 66 App.D.C. 313, 316-317, 87 F.2d 68, 71-72 (1936). In *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (D.D.C. 1956), a decision of a three-judge court, Judge Edgerton speaking for himself and Judge Prettyman said:

> Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not, whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.
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> [Courts] have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

141 F. Supp. at 731-732. *See Hobson* v. *Tobriner,* 255 F. Supp. 295 (D.D.C. 1966).

In light of the assurance provided this court by the Federal appellees that the Chairman and Members of the House District Committee, as presently constituted in the 92d Congress, have no intention of seeking republication or further distribution of the House Committee Report,[20] we believe that the admonition provided by this court in *Cole v. McClellan,* 142 U.S.App.D.C. 24, 26, 439 F.2d 534, 536 (1970), is highly relevant:

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[20] Brief for Federal Appellants at 20 n.44.

> Judicial restraint is certainly proper in a case like the one before us, where the salient factors, taken in conjunction with each other, reveal (a) information delivered to the committee without objection or protest, (b) only the vaguest allegations of anticipated harm—a hypothetical speculation that at some indeterminate future occasion [appellants might suffer some injury] . . .; and (c) a lack of any showing of current activity by the committee staffs which constitute, as to the class of plaintiffs, an actual threat along such lines, or which otherwise give immediacy to the claim that constitutional freedoms are being infringed or jeopardized.

It is clear that the information in question was provided the legislative investigators by the District of Columbia school officials without objection or protest. In view of the fact that the Report had already been published and distributed before this action was instituted and that appellants have only asserted vague allegations of anticipated harm at some indefinable future time, we believe that the court below exercised appropriate judicial restraint in dismissing that part of appellants' complaint which sought the enjoining of the publication and dissemination of the House Committee Report. Any other determination would have caused needless friction between separate and independent departments of the Federal Government.

IV

We also decide that all of the District of Columbia defendant-appellees,[21] as well as the Federal legislative employees named in the complaint,[22] are protected from

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[21] These include the President and Members of the Board of Education, the Superintendent of the Public School System, and the Principal and teacher at Jefferson Junior High School.

[22] Although we concluded in Part II of this opinion that the Federal legislative employees are protected by the Speech or Debate Clause coverage, it is apparent that they are

liability [23] in the instant case by the doctrine of official immunity.

Unlike the constitutionally based Speech or Debate Clause protection, the law of privilege as a defense by governmental officials to civil suits has in large part been of judicial making. *Barr v. Matteo,* 360 U.S. 564, 569 (1959). The courts have recognized that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government." *Id.,* at

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also protected by the official immunity doctrine. Therefore, we have included them in the discussion pertaining to this area.

[23] In light of events which have transpired subsequent to the occurrences of which appellants have complained, concerning the District of Columbia officials, we do not believe that a decision on the injunctive relief sought against these defendant-appellees would be appropriate. On February 17, 1971, the Board of Education of the District of Columbia adopted a revised "Policy Statement Regarding Confidential Information" [see Appendix to this opinion], which appears to fully protect the rights of students, including appellant-pupils herein. There is no reason to think that this new policy will not be fully implemented by all school personnel, thus we are forced to conclude that there is no substantial threat of future injury to appellants which would necessitate a decision on their request for an injunction against the District of Columbia appellees. *Dulles v. Nathan,* 96 U.S.App.D.C. 190, 225 F.2d 29 (1955); *Spreckels Sugar Co. v. Wickard,* 75 U.S.App.D.C. 44, 131 F.2d 12 (1941). *See Golden v. Zwickler,* 394 U.S. 103 (1969); *Davis v. Ichord,* —— U.S.App.D.C. ——, 442 F.2d 1207 (1970); *Reiss v. Richardson,* —— U.S.App.D.C. ——, —— F.2d —— (No. 24,509, decided January 13, 1971).

571. The basic rationale for this doctrinal approach was excellently expressed by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579, 581 (2nd Cir. 1949):

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

See Barsky v. United States, supra, 83 U.S.App.D.C. at 136, 167 F.2d at 250; *Spalding v. Vilas,* 161 U.S. 483, 498-499 (1896); *David v. Cohen,* 132 U.S.App.D.C. 333, 336, 407 F.2d 1268, 1271 (1969).

Official immunity has not been restricted to those in high government positions. "The privilege is not a badge or emolument of exalted office, but an expression of a

policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy." *Barr v. Matteo, supra,* 360 U.S. at 573. *See Cooper v. O'Connor,* 66 App.D.C. 100, 107, 99 F.2d 135, 142 (1938); *Farr v. Valentine,* 38 App.D.C. 413, 420 (1912). Therefore, it is clear that this immunity doctrine is applicable with respect to both the District of Columbia and the Federal officials and employees with whom we are herein concerned.

It has been recognized that, to achieve the desired result, official immunity need not be applied to all actions engaged in by any governmental official. Immunity is only afforded in those instances where the official in question has performed a discretionary [24]—as opposed to a ministerial—act, within the scope of his official duties. *Kendall v. Stokes,* 44 U.S. (3 How.) 87, 98 (1845); *Cooper v. O'Connor, supra,* 66 App.D.C. at 103, 99 F.2d at 138; *Howard v. Lyons,* 360 U.S. 593 (1959). *Cf. Wheeldin* v. *Wheeler,* 373 U.S. 647, 651 (1963). Thus a two-part analysis is required: (1) was the individual performing acts within the scope of his official duties, and (2) did the action undertaken require the exercise of discretion.

> It is not necessary—in order that acts may be done within the scope of official authority—that they should be prescribed by statute (United States v. Birdsall,

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[24] "Where [discretion and judgment] are important, it is desirable that they operate freely and without the inhibiting influence of potential legal liability asserted with the advantage of hindsight." *Elgin v. District of Columbia,* 119 U.S.App.D.C. 116, 119, 337 F.2d 152, 155 (1964).

> 233 U.S. 223, 230-231, . . .); or even that they should be specifically directed or requested by a superior officer. Mellon v. Brewer, 57 App.D.C. 126, 129, 18 F.2d 168, 171, . . . , certiorari denied, 275 U.S. 530, . . . It is sufficient if they are done by an officer "*in relation* to matters committed by law to his control or supervision." [Italics supplied] (Standard Nut Margarine Co. v. Mellon, 63 App.D.C. 339, 341, 72 F.2d 557, 559, certiorari denied, 293 U.S. 605, . . .); or that they have "*more or less connection with* the general matters committed by law to his control or supervision." [Italics supplied] (Spalding v. Vilas, 161 U.S. 483, 498, . . . ; and see Lang v. Wood, 67 App.D.C. 287, 288, 92 F.2d 211, 212); or that they are governed by a lawful requirement of the department under whose authority the officer is acting.

Cooper v. *O'Connor, supra,* 66 App.D.C. at 104, 99 F.2d at 139. *See Barr v. Matteo, supra,* 360 U.S. at 575; *Gregoire v. Biddle, supra,* 177 F.2d at 581. All of the District of Columbia and Federal officials named as defendants have only engaged in official conduct in furtherance of a duly authorized congressional investigation. "It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action." *Watkins* v. *United States, supra,* 354 U.S. at 187. This obligation is even more compelling where the citizen involved is a governmental official. *Pearson* v. *Wright,* 156 F. Supp. 136, 137 (D.D.C. 1957). *See Farr* v. *Valentine,* 38 App.D.C. 413, 419 (1912). Clearly the failure of an official to cooperate when matters under his control are being examined by a congressional committee would amount to malfeasance in office. *See Cooper v. O'Connor, supra,* 66 App.D.C. at 105, 99 F.d at 140. We must therefore conclude that all the complained of actions were undertaken by the defendant-officials within the scope of their official authority.

"The test of whether a challenged action is ministerial or non-ministerial is not the office *per se* or its height,

but whether the function itself was of such discretionary nature that the threat of litigation would impede the official to whom it was assigned." *David v. Cohen, supra,* 132 U.S.App.D.C. at 337, 407 F.2d at 1272. All of the pertinent actions undertaken by the officials in question here were non-ministerial. The District of Columbia school officials were required to exercise judgment in deciding what information they should provide the House District Committee investigators, who in turn, had to exercise clear discretion in determining what data to seek.[25] For these reasons, we are forced to conclude that the District Court properly dismissed the suit against the District of Columbia school officials,[26] as well as against the Federal officials.[27]

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[25] Appellants have in no way challenged these facts, nor could they.

[26] Unlike the situation which was present in *Spencer v. General Hospital of the District of Columbia,* 138 U.S. App.D.C. 48, 425 F.2d 479 (1969) (*en banc*), we believe that the present case is one where "wise considerations of public policy . . . suggest the undesirability of subjecting the [District of Columbia officials] to suit." 138 U.S. App.D.C. at 52, 425 F.2d at 483.

[27] Without intimating any opinion concerning the merits of appellants' substantive claims of official abuse of power, we should note that their remedy—if one is in fact called for—lies not with the courts, as we have indicated, but rather with Congress and the general public.

> "It is, of course, true," as was said in *McCray v. United States,* 195 U.S. 27, 55, "that if there be no authority in the judiciary to restrain a lawful exercise of power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom,

For the foregoing reasons, the decision of the District Court must be

Affirmed.

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after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

Barenblatt v. United States, 360 U.S. 109, 132-133 (1959). *See Tenney v. Brandhove, supra*, 341 U.S. at 378; *Barsky v. United States, supra*, 83 U.S.App.D.C. at 136, 167 F.2d at 250.

It appears from oral argument before the District Court that appellants elected to come immediately to court rather than to approach the School Board or the administration (Tr. 22). By so doing they may have given more publicity to the information they seek to suppress than would have otherwise resulted. This lawsuit thus may not serve the best interests of appellants. We have not explored the question as to whether appellants were required to request the relief they seek from defendants before bringing this lawsuit.

APPENDIX
POLICY STATEMENT REGARDING CONFIDENTIAL INQUIRIES

The Board of Education has determined the need to establish certain policies in order to prevent the disclosure of confidential information and reports regarding students and school personnel. It is the view of the Board that there are aspects of the professional relationships of school personnel with students, parents, and community which must be considered privileged and remain confidential.

The Board of Education in an effort to provide for the protection of the confidentiality of certain information related to school affairs and to respond appropriately to inquiries into the conduct of school affairs in the Public Schools of the District of Columbia establishes the following policies with regard to the release of such information:

1. Formal requests for confidential information regarding students and school personnel, shall be addressed to the Board of Education or its designee and the Superintendent or his designee for appropriate action.
2. The names, addresses and other identifying information related to students are not to be released under any circumstances by school personnel without prior written approval by the Superintendent and President of the Board of Education. The Superintendent and the Board of Education shall ensure that the confidentiality of privileged information is protected.
3. The names, addresses and other identifying information related to teachers or any other school personnel are not to be released under any circumstances by school personnel without prior written approval by the Superintendent and President of the Board of Education. The Superintendent and

the Board of Education shall ensure that the confidentiality of privileged information is protected.

4. The Superintendent shall define with reasonable precision what is privileged information. The Board of Education may review and amend the Superintendent's definitions.
5. Privileged information can only be released as provided for by Chapter XVI, Section 6, Paragraph 1 of the Rules of the Board.

The foregoing shall not be applicable to legislative or judicial subpoenas issued to school personnel. However, upon receipt of such subpoena the employee, through his supervisor, shall as soon as possible contact either the Superintendent or his designee, who, in turn, may refer the matter to the Corporation Counsel for consideration.

Approved by the Board
February 17, 1971

WRIGHT, *Circuit Judge, dissenting*: The issues presented on this appeal do not raise questions of first impression. Indeed, the law in this area has long been the subject of intense judicial scrutiny and, insofar as this case is concerned, the relevant legal doctrines are now well settled. The majority, however, demonstrating a disheartening callousness to the legitimate interests of appellant children, rejects the teachings of experience and strains to revive outworn and repeatedly rejected notions of immunity to justify its result. I cannot and do not concur.

I

The first question presented for review is whether the District Court has jurisdiction of this action as it relates to the congressional appellees.[1] The majority asserts that publication of the report is absolutely immune to judicial scrutiny under the speech and debate clause of the Constitution.[2] Without reaching the more difficult question whether this clause protects members of Congress under these circumstances, *see Powell* v. *McCormack,* 395 U.S. 486, 506 (1969); *Stamler* v. *Willis,* 7 Cir., 415 F.2d 1365, 1368 (1969), *cert. denied,* 399 U.S. 929 (1970), I would hold that the seven congressional appellees who are not members of Congress[3] are not so protected.

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[1] Congressional appellees are (1) the chairman and members of the Committee on the District of Columbia of the House of Representatives; (2) the clerk, staff director, counsel and a consultant to the Committee; (3) the Superintendent of Public Documents and the Public Printer; and (4) the United States.

[2] Art. I, § 6, cl. 1 of the Constitution reads in pertinent part: "The Senators and Representatives * * * for any Speech or Debate in either House * * * shall not be questioned in any other Place."

[3] These include appellees Clark, Gasque and Garber, who are respectively the clerk, staff director and counsel of

The doctrine that the speech and debate clause protects only members of Congress and does not extend to their agents and employees was first enunciated by the Supreme Court in *Kilbourn* v. *Thompson,* 103 U.S. (8 Otto) 168 (1880). In *Kilbourn* the plaintiff was arrested and imprisoned pursuant to a House resolution for refusing to testify at a committee hearing. The case arose in the context of an action for false imprisonment brought by Kilbourn against members of the committee and the sergeant-at-arms who executed the contempt warrant. The Court declared the resolution unconstitutional and, although dismissing the charges as to the congressmen, held that the sergeant-at-arms was not protected by the speech and debate clause and, further, that he was subject to liability for false imprisonment even though he had acted under orders from the House.

Any doubts as to the restricted scope of the speech and debate clause that may have remained after *Kilbourn* were surely erased by the Supreme Court's more recent decisions in *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Powell* v. *McCormack, supra.* In *Dombrowski* the Court held that the speech and debate clause did not cloak the chief counsel to the Senate Internal Security Subcommittee with absolute immunity in an action alleging violations of the plaintiff's Fourth Amendment rights.

Building upon *Kilbourn* and *Dombrowski,* the Court in *Powell* held that an action seeking to compel seating of a member of the House, restoration of seniority privileges, and award of back pay was properly maintainable against the employees of the House. In reaching this result, the Court noted that the purpose of legislative immunity "is

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the Committee; appellee Martin, the Committee investigator; appellee Little, the consultant to the Committee; and appellees King and Spence, the two named officials of the Government Printing Office.

not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." 395 U.S. at 505. Thus it is not enough simply to argue, as does the majority, that the scope of the immunity is in some way dependent upon the validity of the underlying authorization of the employees' conduct. In practical terms, this is a distinction without a difference, for it is now unmistakably clear that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." 395 U.S. at 504. *See Stamler* v. *Willis, supra,* 415 F.2d at 1368; *Hentoff* v. *Ichord,* D. D.C., 318 F.Supp. 1175, 1180 (1970). It is therefore apparent, contrary to the majority's conclusion, that the congressional appellees who are not members of Congress cannot assert a defense of privilege under the speech and debate clause as a bar to the instant suit.

Appellees further contend, however, that this suit is foreclosed by the doctrine of separation of powers. Our system of government is distinguished by the care that has been exercised in committing the legislative, executive and judicial functions to separate departments, and it has long been recognized that each department must avoid the temptation to encroach upon the powers and duties of the coordinate branches of government. *Coleman* v. *Miller,* 307 U.S. 433 (1939); *Octjen* v. *Central Leather Co.,* 246 U.S. 297 (1918); *McCulloch* v. *Maryland,* 17 U.S. (4 Wheaton) 316, 409, 422 (1819). It is equally well established, however, that "such deference cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms," *Watkins* v. *United States,* 354 U.S. 178, 204 (1957), and the mere possibility of conflict cannot justify avoidance of the judiciary's constitutional duty

to protect and ensure the rights of citizens. *Powell* v. *McCormack, supra,* 395 U.S. at 548-549; *Barenblatt* v. *United States,* 360 U.S. 109, 112 (1959). Indeed, the federal judiciary has consistently held that the separation of powers doctrine does not, of its own force, bar judicial review of congressional investigations. *See, e.g., Watkins* v. *United States, supra; United States* v. *Rumely,* 345 U.S. 41 (1953); *Kilbourn* v. *Thompson, supra; Stamler* v. *Willis, supra; Hentoff* v. *Ichord, supra,* 318 F.Supp. at 1181.[4]

The power of the judiciary to inquire into the affairs of the legislature was expressly set forth in *Kilbourn* v. *Thompson, supra,* when the Court quoted with approval from *Burnham* v. *Morrissey,* 14 Gray 226 (Mass. 1859):

> "'The house of representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. * * * Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because, living under a written Constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution * * * . * * *.'"

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[4] While these cases primarily concerned the limits of congressional power to acquire information, it is clear that the same principles should also be applied to issues arising out of congressional utilization of information previously obtained, for use of the information, as well as the means of its aequisition, can infringe constitutionally protected freedoms. *See Hentoff* v. *Ichord,* D. D.C., 318 F.Supp. 1175, 1181 (1970); *cf. Menard* v. *Mitchell,* 139 U.S.App.D.C. 113, 430 F.2d 486 (1970).

103 U.S. at 199. This power of review is not, of course, absolute. Thus in *Baker* v. *Carr*, 369 U.S. 186 (1962), the Supreme Court carefully delineated the permissible perimeters of the political question doctrine, a close cousin to the separation of powers concept. The Court declared that the doctrine would bar judicial scrutiny only where at least one of the following factors was present:

> "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

369 U.S. at 217.

That the present controversy does not fall within the *Baker* v. *Carr* formulation is made clear in *Powell* v. *McCormack, supra,* and *Davis* v. *Ichord,* —— U.S.App. D.C. ——, 442 F.2d 1207 (1970). In *Powell* the Supreme Court applied the principles enunciated in *Baker* in a federal context, holding that the separation of powers doctrine did not bar judicial consideration of a challenge to the attempted exclusion of a congressman by the House of Representatives. After ruling that the right to exclude a duly elected member was not entrusted by the Constitution solely to Congress, 395 U.S. at 518-548, the Court held that since a judicial determination of the plaintiffs' rights required "no more than an interpretation of the Constitution," the controversy involved neither an initial policy determination of a kind clearly for nonjudicial discretion, nor a lack of respect due a coordinate branch

of government. 395 U.S. at 548-549. The Court concluded:

> "• • • Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. *See United States* v. *Brown*, 381 U.S. 437, 462 (1965); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 613-614 (1952) (Frankfurter, J., concurring); *Myers* v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)."

395 U.S. at 549. (Footnote omitted.)

Similarly, in *Davis* v. *Ichord, supra*, this court held that invocation of the separation of powers talisman would not foreclose judicial consideration of allegations that the House Internal Security Committee maintained dossiers which were used to inhibit plaintiffs' exercise of constitutional rights. Reiterating the teachings of *Baker* and *Powell*, we declared that judicial review of "an individual's claim of a constitutional right, and, we may add, an individual's claim of infringement of such a right, 'falls within the traditional role accorded courts to interpret the law,' " and does not in any sense violate the separation of powers doctrine. —— U.S.App.D.C. at ——, 442 F.2d at 1213 (quoting from *Powell* v. *McCormack, supra*, 395 U.S. at 548).

As in *Powell* and *Davis*, the claim asserted here involves a congressional infringement of appellants' rights under the Constitution. Thus judicial determination of this claim requires "no more than an interpretation of the Constitution," and since none of the *Baker* v. *Carr* requirements are satisfied,[5] this court is not barred by the separation of

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[5] See text at pp. 33-34 *supra*. *See also Powell* v. *McCormack*, 395 U.S. 486, 548-549 (1969).

powers doctrine. It is argued, however, that in spite of *Powell* and *Davis* we should refrain from deciding the instant case in order to avoid "needless friction" with a coordinate branch of government. In support of this contention, appellees cite this court's decisions in *Ansara* v. *Eastland*, —— U.S.App.D.C. ——, 442 F.2d 751 (1971), and *Cole* v. *McClellan*, 142 U.S.App.D.C. 24, 439 F.2d 534 (1970). These cases, however, are inapposite.

In *Cole* this court declined to enjoin the chairman, members and staff of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations from using information obtained from various colleges and universities through compulsory process. Although appellants in that case claimed that use of such information would violate their rights under the First Amendment, we held that judicial restraint was proper because

> "the salient factors [of the case], taken in conjunction with each other, reveal (a) information delivered to the committee without objection or protest, (b) only the vaguest allegations of anticipated harm * * *, and (c) a lack of any showing of current activity by the committee staffs which constitute, as to the class of plaintiffs, an actual threat along such lines, or which otherwise give immediacy to the claim that constitutional freedoms are being infringed or jeopardized."

142 U.S.App.D.C. at 26, 439 F.2d at 536. (Footnote omitted.) In the case presently before the court, however, appellants had no notice of the investigation or pending report and therefore had no opportunity to object or protest. Moreover, further publication of the confidential and degrading information involved in this case is likely to have a serious detrimental effect upon the psychological makeup and education of the named children, and there is no reason to believe the Committee staff will not reprint

and further distribute the report if given the opportunity to do so.[6]

Similarly, in *Ansara* v. *Eastland, supra,* the plaintiffs sought relief that would "precede and seek to relate to the conduct of a *future* legislative hearing." —— U.S.App. D.C. at ——, 442 F.2d at 753. (Emphasis added.) The court denied relief because

> "[t]he ongoing legislative process provides opportunity for presentation of plaintiffs' constitutional contentions. Moreover these contentions, which cannot be decided purely by reference to constitutional text, may be affected by the response within the legislative branch. We * * * note that the plaintiffs will have an opportunity to present their constitutional objections to the Subcommittee. * * *"

Ibid. The court then specifically distinguished the present situation, where appellants were not subpoenaed and had no opportunity to claim their constitutional protections at the time of the Committee's hearing.[7] *Ibid.* The legislative process with regard to this report is now complete. Appellants have no other forum in which to assert their constitutional rights; if the judiciary fails to act, these rights will be lost forever.

Finally, appellees and, somewhat surprisingly, the majority urge that *Methodist Federation for Social Action* v. *Eastland,* D. D.C., 141 F.Supp. 729 (1956), establishes

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[6] Although appellees assert that the members of the Committee have no desire to reprint or further distribute the report (brief of federal appellees at 20 n.44), they do not suggest that the other congressional appellees will refrain from further publication and distribution.

[7] Indeed, the court specifically distinguished *Hentoff* v. *Ichord, supra* note 4, which was substantially similar to the present case, because "there was no occasion for further legislative determination as to the matter in controversy." —— U.S.App.D.C. at —— n.3, 442 F.2d at 753 n.3.

the separation of powers doctrine as an immutable bar to judicial consideration of the instant case. In *Methodist Federation* a three-judge court dismissed a complaint seeking to enjoin publication and distribution of a government document where both the Public Printer and the Superintendent of Documents were named as defendants. In reaching this result the court apparently relied, in part, upon both the speech and debate clause and the doctrine of separation of powers, yet it failed even to discuss the implications of *Kilbourn*. Moreover, this decision has never been followed, and in view of the Supreme Court's subsequent decisions in *Baker, Powell* and *Dombrowski* and this court's decisions in *Davis, Ansara* and *Cole*, it obviously is not the law today. *See also Hentoff* v. *Ichord, supra*, 318 F.Supp. at 1180.

II

Thus, although the power of Congress to conduct investigations and to publish its conclusions is broad, it is not unlimited. As the Supreme Court noted in *Watkins* v. *United States, supra*:

> "• • • We cannot simply assume • • • that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy • • •."

354 U.S. at 198-199. Where congressional investigations and reports, no matter how laudable their objectives, encroach upon constitutionally protected liberties, an overriding interest of the state must affirmatively be shown. *See Barenblatt* v. *United States, supra*, 360 U.S. at 126-127.

A brief examination of the nature and scope of relief

sought by appellants may facilitate the search for the precise governmental interests at stake in the present controversy. The material included in the Committee report is not, as the majority contends, merely "somewhat derogatory." One disciplinary letter, for example, alleges that a specifically named child was "involved in the loss of fifty cents" and "invited a male substitute to have sexual relations with her gapping her legs open for enticement." [8] Similar letters accuse named children of disrespect, profanity, vandalism, assault and theft.[9] Of the 29 test papers published in the report, 21 bore failing grades.[10] Yet appellants seek only to prohibit use of the children's names without their consent. They do not contest the propriety of the investigation generally, nor do they seek to enjoin the conclusions or text of the report. Indeed, they do not even challenge the right of Congress to examine and summarize the confidential material involved. They wish only to retain their anonymity.[11] The question presented, then,

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[8] INVESTIGATION AND STUDY OF THE PUBLIC SCHOOL SYSTEM OF THE DISTRICT OF COLUMBIA, H.R. Rep. No. 91-1681, 91st Cong., 2d Sess., at 256 (Dec. 8, 1970).

[9] *Id.* at 253-258.

[10] *Id.* at 224-252.

[11] In terms of the injunction sought by appellants prohibiting any further publication or distribution of the report unless appellants' names and addresses are first deleted, I note that under the Freedom of Information Act, 5 U.S.C. § 552 (1970), where the right of the public to know is often in substantial conflict with an express or implied obligation of confidentiality, the solution has been precisely what appellants suggest here—to permit release of relevant documents and papers with deletion of identifying marks which might otherwise cause an invasion of privacy or breach of a confidential relationship with the individuals concerned. *See Grumman Aircraft Engineering Corp.* v. *Renegotiation Board,* 138 U.S.App.D.C. 147, 149-150, 425

is simply whether the specific identification of particular schoolchildren in a derogatory context furthers any legitimate governmental interest. Appellees, however, fail even to suggest any such interest. Indeed, the invasion of the children's privacy and use of their names without their consent seems totally unrelated to the concededly proper legislative purpose of investigating the condition of the District of Columbia school system. The majority, however, contends that publication of the names may in some obscure way enhance the credibility of the report. But even if such an interest is valid, the balance here must be struck in favor of appellants.

The right of individuals to live their lives and maintain their personalities and affairs free from undue exposure to the outside world is a central premise of our constitutional and legal framework. *See* Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253, 260 (1966). In the time since Warren and Brandeis first enunciated the underpinnings of the right to privacy,[12] the right has matured in status and importance [13] until, in

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F.2d 578, 580-581 (1970); *Bristol Myers Co.* v. *F.T.C.*, 138 U.S.App.D.C. 22, 25-26, 424 F.2d 935, 938-939 (1970). Such a resolution is further buttressed by an analogy to those First Amendment cases requiring government, when it has available a variety of effective means to attain a given end, to choose the measure that least interferes with individual liberties. *See, e.g., United States* v. *Robel*, 389 U.S. 258 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *see also* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254, 267-293 (1964); Note, *Less Drastic Means and the First Amendment*, 78 YALE L. J. 464 (1969).

[12] Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[13] The right of privacy is now recognized in virtually every state, *see* W. PROSSER, LAW OF TORTS 636-637 (2d

1965, it was fully recognized as a core protection of the Bill of Rights. *See Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The scope of the protection is broad, and it safeguards the general "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). Thus a primary thrust of the right is the freedom of the individual to control dissemination of information concerning his affairs.[14]

This protection is, of course, available to appellant schoolchildren, for the right to privacy, like all constitutional rights, is not "shed • • • at the schoolhouse gate." *Tinker* v. *Des Moines School District*, 393 U.S. 503, 506 (1969); *see, e.g., Breen* v. *Kahl*, 7 Cir., 419 F.2d 1034, 1036 (1969), *cert. denied*, 398 U.S. 937 (1970); *Sims* v. *Colfax Community School District*, S.D. Iowa, 307 F.Supp. 485, 487 (1970). Indeed, the inherent nature of the teacher-student relationship demands that any infringements on

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ed. 1955), and in the District of Columbia. *See Pearson* v. *Dodd*, 133 U.S.App.D.C. 279, 410 F.2d 701, *cert. denied*, 395 U.S. 947 (1969); *Afro-American Publishing Co.* v. *Jaffe*, 125 U.S.App.D.C. 70, 366 F.2d 649 (1966) (*en banc*); *Bernstein* v. *National Broadcasting Co.*, D. D.C., 129 F.Supp. 817 (1955), *affirmed*, 98 U.S.App.D.C. 112, 232 F.2d 369, *cert. denied*, 352 U.S. 945 (1956).

[14] The legal concept of privacy protects the individual not only against intrusions into his private affairs, but also against public disclosure of embarrassing private facts. *See Mau* v. *Rio Grande Oil, Inc.*, N.D. Cal., 28 F.Supp. 845, 846 (1939); *Melvin* v. *Reid*, 122 Cal.App. 285, 287, 297 P. 91, 92 (1931); Prosser, *Privacy*, 48 CAL. L. REV. 383, 392-398 (1960); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 977-984 (1964). In addition, it protects the individual where there has been publicity that has placed him in a false light. *See Peay* v. *Curtis Publishing Co.*, D. D.C., 78 F.Supp. 305 (1948); Prosser, *supra*, 48 CAL. L. REV. at 398-401.

the student's privacy be carefully scrutinzed. The student attends school under the command of the law and, as a result, suffers a considerable diminution of his freedom. *See* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545, 548 (1971). The educational system compels the student to reveal his abilities and personality to school authorities. As a result, the school system is, in many respects, a depository of personal and often potentially embarrassing information. As a collector of such information, particularly when obtained under the aura of compulsion, the school has a responsibility to the community to act in a careful and discriminating manner, always being cognizant of the harm that can result if the information is dispersed with reckless disregard for the student's interests.[15] Thus, although the initial compelled exposure of the student's private affairs, which in itself constitutes a severe intrusion upon his right to privacy, is clearly jus-

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[15] In numerous instances the legal system offers protection to persons compelled to reveal information to government. The federal government, for example, often prohibits public disclosure of confidential information where individuals are required to reveal such information to government agencies. *See, e.g.,* 2 FED. TAX REG. § 301.6103(a) (1964); 18 U.S.C. § 1905 (1970). With regard to the Census Act, which forbids public dissemination of information obtained by census takers, 13 U.S.C. §§ 8, 9, 214 (1970), the courts have upheld the constitutionality of compelled disclosure in part because the information revealed is kept strictly confidential. *See United States* v. *Little,* D. Del., 321 F.Supp. 388 (1971); *United States* v. *Rickenbacker,* S.D. N.Y., 197 F.Supp. 924 (1961).

In the area of school records, many states restrict both the type of records that can be obtained by nonschool personnel and the persons who can obtain them. A major qualification of such statutes is that the school records can be inspected for research purposes only if no pupil will be identified by name. *See, e.g.,* CAL. EDUC. CODE § 10751 (1969).

tified by the state's overriding interest in educating its citizens, any further encroachments on the student's privacy—through public dissemination of any matter revealed—must be strictly limited and must clearly be necessary to further important governmental interests.

The educational process is not, of course, grounded solely upon the compulsive nature of school attendance. It is dependent also upon its ability to foster a relationship of trust and confidence between teacher and pupil. At the heart of such a relationship is the guarantee that whatever is revealed to the teacher is disclosed in privacy. The student must have a reasonable expectation that his confidence will be preserved. *See* Jourard, *Some Psychological Aspects of Privacy,* 31 LAW & CONTEMP. PROB. 307, 311-312 (1966); *see also* Fried, *Privacy,* 77 YALE L. J. 475 (1968). Release of confidential information by school authorities, however, can serve only to destroy the fabric of this trust. And when this breach of trust is compounded, as is contemplated here, by a public disclosure of the failures and inadequacies of specifically named children, the inevitable consequence is the creation of an atmosphere of distrust, anxiety and fear that is itself destructive of the learning process. *See Shelton* v. *Tucker,* 364 U.S. 479, 487 (1960); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). As one learned educator has noted:

> "• • • [M]ost children in school are scared most of the time, many of them very scared. Like good soldiers, they control their fears, live with them, and adjust themselves to them. But the trouble is, and here is a vital difference between school and war, that the adjustments children make to their fears are almost wholly bad, destructive of their intelligence and capacity. The scared fighter may be the best fighter, but the scared learner is always a poor learner."

J. HOLT, HOW CHILDREN FAIL 75 (Dell ed. 1970).

The educational process has been described as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education of Topeka*, 347 U.S. 483, 493 (1954). If our schools are to achieve these goals, it is essential that they present an image of a fair society to these students. We must not compound the numerous negative faces our society already reveals to our youngest citizens. Yet treatment that degrades the student, invades his privacy, and frustrates his ability to gain self-respect must inevitably lead to disillusionment with the society that permits such unfairness and destroys the very foundation upon which he can prepare for a socially productive life.

Publication of this report without excision of the children's names would have consequences far beyond the classroom. These children are not public figures. They have in no way thrust themselves into the public spotlight and have done nothing voluntarily to attract public attention. Yet, once branded, the mark of Cain would follow them for the rest of their lives, seriously impairing their employment opportunities and future careers. A person should be allowed to live without the constant fear that previous indiscretions, particularly childhood indiscretions, will rise from the past to mark him anew. *See Melvin* v. *Reid*, 122 Cal.App. 285, 297 P. 91 (1931).

In light of these considerations,[16] and in the absence of

[16] Appellants urge further that publication of their names in a stigmatizing manner without notice or hearing violates the requirements of due process. *See Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). In addition, they contend that such publication constitutes an unconstitutional bill of attainder. *See Wisconsin* v. *Constantineau*, *supra*, 400 U.S. at 444 (Mr. Justice Black, dissenting); *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866). However, I need not reach those questions here.

any overriding governmental interests, I would reverse the District Court's dismissal of this case for lack of jurisdiction and remand for a determination whether an injunction is necessary to prevent any further publication or distribution of this report unless and until the names and addresses of the appellant children are excised.

III

In addition to appellants' demand for an injunction against the congressional appellees, this case presents many other important and complex claims, all of which were summarily dismissed by the District Court. In ruling on a motion to dismiss, the court must assume all material allegations of the complaint to be true,[17] and the complaint should be dismissed only if it "appears that appellant[s] could 'prove no set of facts in support of [their] claim which would entitle [them] to relief.'"[18] Given these guidelines, I would hold that the District Court's characterization of appellants' claims as "frivolous" was improper and, therefore, that it erred in dismissing these claims without a hearing. Because of this summary dismissal, however, the record as it presently stands is so incomplete as to make it virtually impossible, as far as factual questions are concerned, for this court intelligently to pass on the merits of appellants' claims. Although the majority did not permit this obstacle to stand in its way, I would remand this case to the District Court for a full hearing on the merits.

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[17] *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 172 (1967); *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 482 (1947); 2A J. MOORE, FEDERAL PRACTICE ¶ 12.08 (1968).

[18] *Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969). *See, e.g., Dollar* v. *Land*, 81 U.S.App.D.C. 28, 30, 154 F.2d 307, 309 (1946).

Appellants claim, for instance, that release of confidential information without deletion of the students' names renders the teacher and principal of Jefferson Junior High School liable in tort for violation of appellants' common law right of privacy.[19] In defense, appellees contend that they are protected by the doctrine of official immunity, alleging that release of such information was in furtherance of a "discretionary" rather than a "ministerial" function. *See Barr* v. *Matteo,* 360 U.S. 564 (1959); *David* v. *Cohen,* 132 U.S.App.D.C. 333, 407 F.2d 1268 (1969). Unlike the majority, I would not pass on that question, for it could not soundly be resolved on the sparse record presently before us. As we noted in *Carter* v. *Carlson,* —— U.S.App. D.C. ——, ——, 447 F.2d 358, 362 (1971), *cert. granted,* —— U.S. ——, 40 U.S. L. WEEK 3314 (January 10, 1972):

> "The distinction between discretionary and ministerial functions in this context must be drawn primarily with reference to its purpose. * * * Accordingly, in determining whether a particular government function falls within the scope of official immunity, it does not suffice to consider simply whether the officer has 'discretion' in the sense that he exercises judgment in choosing among alternative courses of action. The proper approach is to consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct."

(Footnotes omitted.) Disdaining the teaching of *Carter,* however, the majority here simply concludes that the conduct of these appellees was discretionary in nature. I cannot join this conclusion, for the complex factual determinations required for intelligent resolution of this issue can

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[19] Invasion of privacy is soundly established as a common law tort in the District of Columbia. *See Pearson* v. *Dodd, supra* note 13; *Afro-American Publishing Co.* v. *Jaffe, supra* note 13; *Bernstein* v. *National Broadcasting Co., supra* note 13.

be made only after a full evidentiary hearing, and the majority's attempt to decide this question in the present vacuum exemplifies the futility of appellate fact finding.[20]

Moreover, the majority's disposition of this appeal fails even to consider several additional questions raised by appellants. For example, the majority simply ignores the possibility that monetary relief might lie against appellee Little, an independent consultant to the Committee who allegedly prepared the report for publication. It has never actually been decided whether Little was an "employee" of the House within the meaning of the official immunity doctrine; yet if he was not so "employed" the defense of privilege would be unavailable to him in appellants' common law suit for invasion of privacy. In a somewhat similar vein, a question exists as to the status of appellee Martin, a District of Columbia policeman who, while on loan to the United States Capitol Police, allegedly participated in transmittal of school records to the Committee. An inquiry should be made into the nature and propriety of this "loan," for if Martin's investigative activities were beyond

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[20] Similarly, the majority opinion leaves open the question whether these appellees—the teacher and principal—might be liable to appellants under 42 U.S.C. § 1983, Civil Rights Act of 1871 § 1, R.S. § 1979, 42 U.S.C. § 1983 (1964), for deprivation of their constitutionally protected right of privacy. It should be noted that the courts have consistently held that the District of Columbia is a "State or Territory" within the meaning of this statute. *See, e.g., Hurd* v. *Hodge*, 334 U.S. 24 (1948); *Talbott* v. *Silver Bow County*, 139 U.S. 438 (1891); *Sewell* v. *Pegelow*, 4 Cir., 291 F.2d 196 (1961). Liability under the common law and under 42 U.S.C. § 1983 is not necessarily coextensive, and the scope of the official immunity doctrine seems narrow under the federal statute. *See, e.g., Carter* v. *Carlson*, —— U.S.App.D.C. ——, 447 F.2d 358 (1971), *cert. granted*, —— U.S. ——, 40 U.S. L. WEEK 3314 (Jan. 10, 1972); *McLaughlin* v. *Tilendis*, 7 Cir., 398 F.2d 287 (1968); *Jobson* v. *Henne*, 2 Cir., 355 F.2d 129 (1966).

the scope of his duties as an employee of the District of Columbia, but were not sufficient to render him an employee of the House, he would be precluded from asserting official immunity as a defense to appellants' common law action for damages.

Because of the District Court's summary dismissal of this case, we are left virtually in the dark on these and other [21] vital aspects of the instant controversy. An intelligent resolution of appellants' claims demands more information than can presently be gleaned from the record in its abbreviated state. Confronted with such a dilemma, the majority's unfortunate response is simply to usurp the fact finding function or, worse, to ignore the issues entirely. I can neither condone nor join such a decision. This case should be remanded to the District Court for preparation of a proper record so that it may test appellants' factual allegations and pass initially upon the legal issues involved.

I respectfully dissent.

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[21] For example, a question exists whether the District of Columbia might be vicariously liable to appellants for disclosure of confidential school information by its employees. Such liability might be predicated upon either common law principles or 42 U.S.C. § 1983. *See* note 20 *supra*. And although this issue is not resolved simply by finding that the employees themselves may assert a defense under the official immunity doctrine, *see Carter* v. *Carlson*, *supra* note 20, the majority fails even to consider this claim.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1971

Civil 56-71

[Filed Jan. 20, 1972, United States Court of Appeals for the District of Columbia Circuit /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL.

Appeal from the United States District Court for the District of Columbia

Before: WILBUR K. MILLER, Senior Circuit Judge, and WRIGHT and MacKINNON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court:

/s/ Nathan J. Paulson
NATHAN J. PAULSON
Clerk

Dated: January 20, 1972.

Opinion for the Court filed by MacKinnon, Circuit Judge.
Dissenting opinion filed by Circuit Judge Wright.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1027 September Term, 1971

Civil 56-71

[Filed Mar. 10, 1972, United States Court of Appeals for the District of Columbia Circuit /s/ Nathan J. Paulson, Clerk]

JOHN DOE, ET AL., APPELLANTS

v.

JOHN L. MCMILLAN, ET AL.

Before: Wilbur K. Miller, Senior Circuit Judge; Wright and MacKinnon, Circuit Judges

ORDER

On consideration of appellants' motion for stay of mandate pending application for a writ of certiorari, of appellants' request for a continuation of injunction pending certiorari proceedings, and of the opposition of the Federal Appellees to the motion for continuation of injunction pending certiorari proceedings, it is

ORDERED by the Court that the Clerk is directed to stay the issuance of the opinion and certified copy of this Court's judgment, for a period of 30 days from the date of this order. This stay is subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure, and it is

FURTHER ORDERED by the Court that the injunction previously entered by this Court on January 14, 1971, as modified on March 11, 1971, shall continue in effect pending the filing of a petition for writ of certiorari in the Supreme Court, and thereafter, until final action by the Supreme Court.

Per Curiam

Senior Circuit Judge Wilbur K. Miller would deny appellants' motion and request.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

JOHN DOE, ET AL., PETITIONERS

v.

JOHN L. MCMILLAN, ET AL.

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 473482 59

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6356

JOHN DOE, BY HIS GUARDIAN, MARY DOE, AND RICHARD ROE, BY HIS GUARDIAN, MARY ROE, PETITIONERS

v.

JOHN L. MCMILLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR LEGISLATIVE RESPONDENTS[1]

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the Constitution and the official immunity doctrine preclude claims for declaratory relief, injunction and damages against Members, employees and agents of

[1] This brief is filed on behalf of the following respondents: nineteen Members of Congress who were the Chairman and some of the Members of the Committee on the District of Columbia of the House of Representatives in the 91st Congress, the clerk, staff director, counsel, a consultant and an investigator of the Committee, the Public Printer and the Superintendent of Documents.

the United States House of Representatives in connection with a valid legislative act, i.e., the publication and distribution of a duly authorized Committee report which was ordered to be printed by the House of Representatives.

2. Whether a report of a Committee of Congress, investigative in nature, constitutes a Bill of Attainder.

STATEMENT

Petitioners, who appear to be students or parents of students, seek declaratory and injunctive relief against further publication and distribution of a Congressional document, a report of a Committee of the United States House of Representatives, and sue for both punitive and compensatory damages for alleged violations of their "statutory, regulatory, administrative, common law, and constitutional rights."

The report in question (H. Rep. No. 91–1681, 91st Cong., 2d Sess. (1970)) is a study of the District of Columbia public school system, conducted on behalf of the Committee on the District of Columbia of the House of Representatives by a Special Select Subcommittee under the authority of H. Res. 76, 91st Cong., 1st Sess. (1969).[2]

In the opening pages of the report the Committee makes thirty-six specific findings, resulting from more than seven months of investigation and study and fourteen hearings at which members of the School Board and other school and city officials testified.

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[2] H. Res. 76 is reproduced as Appendix D of the petition for a writ of certiorari.

Included within the 450 page report, as a small part of the supporting data for the Committee findings, are copies of absence sheets, lists of "class cutters", copies of certain test papers and copies of various documents relating to several students who presented disciplinary problems at one school.[3] The report states that these were printed to give a realistic view of a troubled school and lack of administrative effort to rectify the problems (at p. 212); to show the poor reading ability of seventh graders given a fifth grade history test (at p. 223); to outline the egregious conduct of a student which did not result in suspension (at p. 253); and to illustrate suspension problems (at pp. 256–258). These inclusions in the report are the gravamen of petitioners' complaint against respondents on whose behalf this brief is filed. Petitioners do not contend that the Committee's investigation and report were not legitimate legislative activities or that they were otherwise beyond the scope of the Committee's authority. Their contentions are that, in divulging names from "confidential records", the part of the report against which their complaints are directed violated their right to privacy and constituted a bill of attainder (Pet. 6–8, 14).

The Committee report on which petitioners' allegations are founded was transmitted to the Speaker of the House of Representatives by the Chairman of the Committee, was committed to the Committee of the Whole House on the State of the Union and was

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[3] H. Rep. No. 91–1681, *supra*, at pp. 212–253, 256–258.

ordered to be printed by the House.[4] Thereafter the report was printed and distributed by the Government Printing Office in accordance with the dictates of 44 U.S.C. 701, 719 and 727.

ARGUMENT

I

THE SPEECH OR DEBATE CLAUSE OF THE CONSTITUTION AFFORDS TOTAL AND ABSOLUTE IMMUNITY TO THE RESPONDENTS WHO ARE MEMBERS OF CONGRESS

Article I, Section 6 of the Constitution provides that "* * * for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The protection afforded Members of Congress by this clause clearly extends to committee reports. In *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969), this Court said:

> * * * we have held that it would be a "narrow view" to confine the protection of the Speech or Debate Clause to words spoken in debate. *Committee reports*, resolutions, and the act of voting are equally covered * * *. [Emphasis added.][5]

There can be no question that the report involved in this case was within the power of Congress to issue. Congress has plenary power to legislate for the Dis-

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[4] 116 Cong. Rec. 40311, and H. Rep. No. 91-1681, *supra*, at pages (I) and (V). Petitioners concede (Pet. 7) that publication and distribution of the report was "* * * by order of the full House of Representatives * * *."

[5] *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881), also makes express mention of committee reports being within the reason of the rule enunciated by the Speech or Debate Clause.

trict of Columbia.[6] This broad power is accompanied by inherent powers of inquiry "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1959).

The complaint in this case centers around a duly authorized report by a Committee of the House of Representatives which was ordered to be published by the House itself.[7] Certainly the Committee and the House were acting within "the sphere of legitimate legislative activity". *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951). This being the case, judicial inquiry should be at an end with respect to the respondent-legislators, for the Speech or Debate Clause does more than provide a defense on the merits. It protects a legislator from the annoyance and harassment of having to devote his efforts to defending himself in court against charges related to his valid legislative acts. *Powell* v. *McCormack, supra,* 395 U.S. at 502–503; *Dombrowski* v. *Eastland,* 387 U.S. 82, 84–85 (1967).

II

THE SPEECH OR DEBATE CLAUSE OF THE CONSTITUTION AFFORDS TOTAL IMMUNITY TO EMPLOYEES AND AGENTS OF CONGRESS IN THE CONTEXT OF THIS CASE

The protection of the Speech or Debate Clause extends in this case to the seven respondents who are not

[6] Art. I, Section 8 of the Constitution.

[7] In *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (D.D.C. 1956), a case virtually identical to the instant case on its material facts, a three-judge district court held that it was without authority to enjoin the printing and distribution of a Senate Document.

members of Congress but are clearly their employees and agents.[8]

That employees of Congress may be immune was first recognized in *Kilbourn* v. *Thompson, supra.* While the Court there found the Sergeant at Arms of the House of Representatives to be subject to civil liability for the illegal arrest of an uncooperative witness, the decision made clear that liability arose only from the lack of constitutional authority in the House to order the arrest.

In *Dombrowski* v. *Eastland, supra,* 387 U.S. at 85, this Court held that the doctrine of legislative immunity has "its roots * * * in the Speech or Debate Clause" and that it "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." In the context of this case, we submit that "less absolute" means only that, before applying the doctrine of immunity to a legislative employee or agent, the courts must first determine that he was acting within the scope of the authority vested in him in the exercise of Congress' constitutional powers. *Dombrowski* illustrates this principle. After sustaining the dismissal of the complaint as to a Senator, the Court reversed and remanded the case for further proceedings to determine whether a legislative employee had transgressed the limits of Congressional power under the Constitu-

[8] The Clerk, Staff Director, and Counsel for the Committee, an investigator for and a consultant to the Committee, and two officials of the Government Printing Office.

tion so as to expose him to liability.[9] *Powell* v. *McCormack, supra,* further supports this view of "less absolute" immunity conferred on legislative employees by the Speech or Debate Clause. Although stating that the purposes of the Clause "are fully protected if legislators are relieved of the burden of defending themselves", the Court added that it "did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued." 395 U.S. at 505–506. Had this Court, in *Powell,* found in favor of the "merits of the challenged congressional action", surely the immunity would have been extended to the congressional employees.

This line between what is or is not a valid act on the part of a congressional employee is not difficult to draw. As in *Powell,* the constitutionality of the act of the employee acting at the direction of the legislature depends in turn on the constitutionality of the "underlying legislative decision". 395 U.S. at 504. The Court itself drew this line by stating (*ibid.*):

> The Court first articulated in *Kilbourn* and followed in *Dombrowski* v. *Eastland* the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the *unconstitutional* activity are responsible for their acts. * * * [Emphasis added.]

[9] See also *Tenney* v. *Brandhove, supra,* 341 U.S. at 377–378, where, in discussing a possible abuse by a state legislative committee, the Court said, "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province."

We do not have here *Kilbourn* or *Powell* situations, where constitutional sanction for the legislative decision was lacking. Neither do we have facts analogous to *Dombrowski*, where an issue as to illegally seized evidence was present. Nor do we have the situation presented to this Court in *Gravel* v. *United States* and *United States* v. *Gravel*, Nos. 71–1017 and 71–1026, pending on writs of certiorari, where a grand jury subpoena in a criminal proceeding raises issues of possible illegal acquisition of material which was incorporated into a Senate document and private republication of that document.

Rather, we have here legislative employees and agents performing those very functions which were necessary to accomplish a valid legislative act, the issuance and publication of an authorized committee report.[10]

Congress must have staff to function. The Speech or Debate Clause affords an umbrella of immunity to this staff so long as their activities are within the legislative ambit vested in Congress by the Constitution. Such is clearly the case here. To hold otherwise would frustrate the intendment of the Speech or Debate Clause and its underlying objectives.

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[10] We are aware of no contention that any of the legislative employees and agents did any act beyond the scope of their legislative duties. In fact, the complaint does not allege that Messrs. Clark, Gasque and Garber (Clerk, Staff Director and Counsel, respectively, to the Committee) did any acts whatsoever; and it is clear that the Public Printer and Superintendent of Documents did only what was required of them by statute. 44 U.S.C. 701, 719, 727.

III

THE DOCTRINE OF OFFICIAL IMMUNITY LIKEWISE AFFORDS IMMUNITY TO EMPLOYEES AND AGENTS OF CONGRESS IN THIS CASE

Whatever its doctrinal roots, whether based on the Speech or Debate Clause, separation of powers or the common law, there is a clearly enunciated judicial cloak of immunity for legislative employees and agents, the threads of which run through the cases cited in part II of this argument (all of which involved employees as well as legislators). This is based on the same logic and has the same purpose as the doctrine of official immunity enunciated in *Barr* v. *Matteo,* 360 U.S. 564 (1959). The Court there recognized that—

> officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. * * * The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. 360 U.S. at 571, 572–573.

A question of immunity for a legislative employee was before the Court in *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963). The complaint alleged that Wheeler, an investigator for a House committee, had filled in the plaintiff's name on a subpoena without authorization of the committee, the subpoena having been signed in blank by the chairman. The Court sustained dismissal of the complaint on another ground, but also clearly recognized that the test of liability was whether Wheeler was "acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play." 373 U.S. at 651. The immunity doctrine referred to in *Wheeldin* was not that under the Speech or Debate Clause but the broad and absolute immunity of any government employee acting within the scope of his authority, or as stated in *Barr* v. *Matteo,* 360 U.S. at 575, for "action * * * taken * * * within the outer perimeter of [the] line of duty * * *".[11]

The legislative employees and agents in this case were clearly acting well within the "outer perimeter" of their duty: the staff of the Committee were functioning to assist Members of Congress in accomplishing a valid legislative act; and the officials of the Government Printing Office, in printing the report,

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[11] Judicial officers are also immune from actions for civil damages caused by their judicial acts. *Bradley* v. *Fisher*, 13 Wall. 335 (1872). See also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2, 1949), cert. denied, 339 U.S. 949, for an enunciation of the rationale of the official immunity doctrine by Judge Learned Hand.

were acting at the express direction of the House and, in fact, pursuant to statute.[12]

IV

THE DOCTRINES OF SEPARATION OF POWERS AND JUDICIAL RESTRAINT PRECLUDE JUDICIAL REVIEW OF THE ACTIONS OF CONGRESS IN THIS CASE

Since 1805 this Court has wisely recognized limitations upon judicial review of actions of the legislative branch. Chief Justice Marshall, speaking for the Court in *United States* v. *Fisher,* 2 Cranch 358, 396 (1805), stated: "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

In *McCulloch* v. *Maryland,* 4 Wheat. 316, 423 (1819), Chief Justice Marshall reiterated this concern in stating that "to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretension to such a power."

Within the framework of these pronouncements, the complaint in this case must fail. Petitioners seek injunctive relief against further official publication and distribution of a valid and authorized document of the House of Representatives and seek damages against Congressmen, their employees and agents, for its initial official publication. The ground for this relief is alleged to be an invasion of privacy by including

[12] See note 10, *supra*, p. 8.

the names of students in the document in a derogatory context.

We submit that there exists no legally recognizable right of privacy militating against such inclusion. If we assume such a right, *arguendo,* whatever penumbra of privacy may exist must bow to the right and prerogative of Congress to pursue legitimate legislative objectives by means of its choice, in this case by the time-honored means of committee inquiry and report. To hold otherwise would open a veritable Pandora's box of judicial review of valid Congressional activities and create needless friction between coordinate branches of government.

It is, of course, true that the courts have the power to review legislative acts, and there are times when the deference due a coordinate branch of government must yield to the necessity for judicial review of a particular issue. But the circumstances under which review is undertaken should be exceptional. Contrary to petitioners' contention (Pet. 25–26) that none of the criteria barring judicial review under the separation of powers doctrine as set forth disjunctively in *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), and reiterated in *Powell* v. *McCormack, supra,* 395 U.S. at 518–519, is present in this case, some, at least, of those criteria are clearly involved and any one of them precludes a finding of justiciability in the questions petitioners would have the Court adjudicate. To paraphrase the criteria, there is in this case "a textually demonstrable constitutional commitment of the issue to a coordinate political department," principally in Article I, Section 8 of the Constitution vesting in Congress plenary

legislative authority over the District of Columbia; there is "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion", i.e., the determination of the House Committee on the District of Columbia to include in its report the materials upon which petitioners' complaint is based and the decision of the House itself to print the report; and there is "the impossibility of a court's undertaking independent resolution [of the question of including these materials] without expressing lack of the respect due coordinate branches of government." Singly and together these principles dictate rejection of petitioners' contentions.[13]

V

THE LEGISLATIVE ACTION COMPLAINED OF DOES NOT CONSTITUTE A BILL OF ATTAINDER

Petitioners contend that the House of Representatives' publication of the report in question constitutes a bill of attainder (Pet. 19–22). The court below held that this contention, like their other claims of violations of their rights, is unavailing in view of the lack of jurisdiction in the courts to review this legislative action (Pet. App. A., pp. 4–5, 6).[14]

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[13] See also *Cole* v. *McClellan*, 439 F. 2d 534, 536 (C.A.D.C. 1970), for a recent application of judicial restraint in connection with information delivered to a Congressional committee as to which there were only the vaguest allegations of anticipated harm.

[14] The dissenting judge below noted this contention and petitioners' further claim of a violation of due process, but found it unnecessary to "reach those questions" (Pet. App. A, p. 43).

The contention is in any event without merit. By definition—

> * * * "A bill of attainder, by the common law, as our fathers imported it from England and practiced it themselves, before the adoption of the Constitution, was an act of sovereign power, *in the form of a special statute* * * * by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment *per legem terrae*." Farrar, Manual of the Constitution (1867) 419. * * * It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's interests indicated a judicial trial, that the Constitution prohibited. * * * *United States* v. *Lovett,* 328 U.S. 303, 322 (1946), Frankfurter, J., concurring. [Emphasis added.]

However the term may be defined, it is clear that a bill of attainder is a legislative enactment. This is demonstrated by the very authorities petitioners cite in support of their contention—*Cummings* v. *Missouri,* 4 Wall. 277 (1867); *United States* v. *Lovett, supra; United States* v. *Brown,* 381 U.S. 437 (1965); *Wisconsin* v. *Constantineau,* 400 U.S. 433, 443 (1971), Black, J., dissenting. All of these cases involved a legislative act in the form of an enactment.[15] Thus,

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[15] In the *Cummings* case the bill of attainder was enacted as part of the post-Civil War constitution of Missouri. The *Constantineau* case involved administrative action under the authority of a state statute. In the dissenting opinion upon which petitioners rely (Pet. 22), Mr. Justice Black said only that the effect of the "sweeping powers" granted by the statute "is practically the same as that of an old common-law bill of attainder." 400 U.S. at 444.

petitioners' attempt to equate the House's publication of the committee report to an enacted law, the only form of legislative action which can constitute a bill of attainder, is contrary to reason and authority.

CONCLUSION

The petition for a writ of certiorari should be denied as to respondents on whose behalf this brief is filed.

Respectfully submitted.

FRED M. VINSON, JR.,
800 17th Street NW.,
Washington, D.C. 20006.

WILLIAM C. CRAMER,
JAMES S. RUBIN,
Suite 4100, 485 L'Enfant Plaza SW.,
Washington, D.C. 20024.

WALTER C. DEVAUGHN,
General Counsel,
Government Printing Office,
Washington, D.C. 20401.

MAY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, *et al.*,
Petitioners,

v.

JOHN L. McMILLAN, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

URBAN LAW INSTITUTE

JEAN CAMPER CAHN
MICHAEL J. VALDER
G. DAN BOWLING
RONALD G. YELENIK
Suite 509
1145 19th Street, N.W.
Washington, D.C. 20036

Counsel for Petitioners

Washington, D.C. • THIEL PRESS • (202) 393-0625

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IN THE

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OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, *et al.*,
Petitioners,

v.

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Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (App. 67-113) is not yet officially reported. The opinion of the court of appeals of March 11, 1971, imposing a modified injunction pending determination of an expedited appeal (App. 57-64) is reported at 442 F.2d 879. The order of the

United States District Court for the District of Columbia dismissing the complaint on January 11, 1971 (App. 48-50) has not been officially reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1972. The petition for writ of certiorari was filed on March 18, 1972. Certiorari was granted on June 26, 1972. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the publication of a report by the House of Representatives constitutes a Bill of Attainder where the report contains the names of impoverished school children, together with highly embarrassing, scandalous and possibly libelous excerpts from private and confidential school records such as failing test papers, lists of supposed absentees and class-cutters, and disciplinary records including memoranda alleging sexual immorality and criminal conduct.

2. Whether the Speech or Debate Clause of the Constitution requires a dismissal by the federal judiciary of an uncontroverted complaint by a group of impoverished parents on behalf of their school-aged children against congressmen who were members of a congressional committee, alleging that the congressmen unconstitutionally, tortiously and without any legislative purpose whatsoever violated petitioners' constitutionally protected right of privacy by ordering the Government Printing Office to publish a committee report containing

the names of the children, together with highly embarrassing, scandalous and possibly libelous information derived surreptitiously and unlawfully from private and confidential school records.

3. Whether the Speech or Debate Clause of the Constitution is so sweeping in its coverage that it requires a dismissal by the federal judiciary of an uncontroverted complaint against congressional committee staff members, a consultant to the committee, an investigator for the committee, and officials and employees of the Government Printing Office who participated in an unconstitutional and intentionally tortious violation of petitioner's right of privacy by the disclosure and publication of petitioners' names, together with highly embarrassing, scandalous and possibly libelous information derived from their private and confidential school records.

4. Whether the doctrine of official immunity requires a dismissal by the federal judiciary of an uncontroverted complaint against congressional committee staff members, a consultant to the committee, an investigator for the committee, officials and employees of the Government Printing Office, and officials and employees of the District of Columbia public school system, who participated in an unconstitutional and intentionally tortious violation of petitioners' right of privacy by the disclosure and publication of petitioners' names, together with highly embarrassing, scandalous and possibly libelous information derived from their private and confidential public school records.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 6, Clause 1 of the Constitution provides, in pertinent part, that

> The Senators and Representatives . . . for any Speech of Debate in either House . . . shall not be questioned in any other Place.

Article I, Section 9, Clause 3 of the Constitution provides, in pertinent part, that

> No Bill of Attainder or ex post facto law shall be passed.

The Fourth Article of Amendment to the Constitution provides that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Article of Amendment to the Constitution provides, in pertinent part, that

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

The Ninth Article of Amendment to the Constitution provides that

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Article of Amendment to the Constitution provides that

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Petitioners, impoverished parents and their children, filed a class action in the United States District Court for the District of Columbia seeking a declaratory judgment, injunctive relief and damages, claiming that they and their children had been subjected to a bill of attainder and that their common law and constitutionally protected right of privacy had been violated when employees and officials of the District of Columbia school system divulged confidential, highly embarrassing and privileged records and information concerning the school children to an investigator working with the staff of the House of Representatives Committee on the District of Columbia, and thereafter, when these private, confidential and privileged documents were published by the Government Printing Office in a Report of the House District Committee [House Report No. 91-1681, 91st Cong. 2d Sess., (App. p. 44)].[1]

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[1] Defendants named in the complaint were John L. McMillan, the Chairman; the other members of the House of Representative Committee on the District of Columbia; the Clerk, Staff Director and Counsel of the Committee; a consultant to the Committee; an

The Committee's investigation and Report were ostensibly authorized by a Resolution of the House of Representatives which stated that the Committee on the District of Columbia

> . . . is authorized to conduct a full and complete investigation and study of . . . (1) the organization, management, operation and administration of any department or agency of the government of the District of Columbia; (2) the organization, management, operation and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; . . . [H. Res. 76, 91st Cong. 1st Sess., Feb. 5, 1969 (App. pp. 45-46)].

The Resolution only implicitly authorized an investigation of the District of Columbia public schools, and it clearly did not authorize an inquisition into the private, confidential and privileged records of individual pupils who are entitled to a high standard of fiduciary trust on the part of school and government officials and to a high degree of confidentiality and privacy in the retention of disciplinary, counseling and academic records created as a result of their attendance in public schools under the compulsion of law. Indeed, the resolution authorizing the investigation made no provision nor did it authorize the collection of any information or documents through any means except by production at hearings of the Committee or subcommittee (App. 44). The information and

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investigator for the Committee; the Superintendent of Documents and the Public Printer of the Government Printing Office; the Members of the Board of Education of the District of Columbia; the Superintendent of the Public Schools of the District of Columbia; the Principal and a teacher at the Jefferson Junior High School; and the United States of America.

documents involved here were not produced or obtained at hearings; rather, they were surreptitiously obtained by the Committee's investigator (Respondent Martin, who was also employed as a sergeant of the Metropolitan Police Department) from a teacher (Respondent Irven) and the principal (Respondent Savoid) of Jefferson Junior High School (App. 9; Complaint, para. 7) in "clandestine or semi-clandestine ways" (App. 27; hearing on motion for temporary restraining order). Thereafter, the Committee's investigator delivered the information and documents to a contract consultant to the Committee (Respondent Little) who caused copies of the documents to be included in the Report (App. 9; Complaint, para. 8).

The Report, entitled "Investigation and Study of the Public School System of the District of Columbia", was ordered to be printed on December 8, 1970, by "The Committee of the Whole House on the State of the Union", to which it had been committed pursuant to a transmittal letter of the same date (App. 47) from respondent John L. McMillan as Chairman of the Committee on the District of Columbia to the Speaker of the House. Thus, the Report was initiated by a Resolution of the full House of Representatives, and it was ordered into print by the full House of Representatives sitting as the Committee of the Whole House on the State of the Union.

Involved here is the publication and distribution, by order of the full House of Representatives, of information and names never spoken on the floor of the House nor spoken by congressmen in committee hearings, yet in a context which is clearly derogatory, embarrassing, possibly libelous, and in violation of petitioners' consti-

tutionally protected right to be left alone—the right to privacy.

The authorizing Resolution did not request or even suggest that confidential school papers or the names of failing students, delinquents or class-cutters be obtained and published. The authorizing Resolution did not state that the Committee staff was to investigate the discipline problems of the schools or the scholastic records of children; nor did it authorize the illegal collection of private and protected information about school children or the publication of a list of the names of children who were cutting classes, suspected of sexual depravity, or failing academically. Nowhere did the Resolution call for the collection or publication of tests, including the names of children, or of disciplinary letters or other disciplinary memoranda with the names of the students and their parents or guardians. The Resolution clearly did not contemplate the surreptitious, clandestine and broad inquisition which was conducted, nor did it authorize the sensational exposé published thereafter which trammeled unmercifully upon the childrens' right of privacy.[2]

The District Court dismissed petitioners' claims as to all defendants, although none of the claims or factual allegations were controverted, on the basis that the

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[2] Although the complaint initially named all of the members of the House District Committee as defendants, the Court of Appeals on June 7, 1971, granted petitioners' subsequent motion to sever and dismiss as to Congressmen Brock Adams, Charles C. Diggs, Jr., Donald M. Fraser, Gilbert Gude, and Andrew Jacobs, Jr. The stipulation upon which such dismissal was based indicated that these Congressmen opposed the distribution of the House Committee Report so long as the names complained of remained therein and that they would have voted against the publication thereof had they been given the opportunity to do so.

federal judiciary lacked jurisdiction to entertain claims by private citizens against any of the defendants. The claims against the defendants of the legislative branch of the federal government were dismissed "under the official immunity doctrine of *Barr v. Matteo*, 360 U.S. 564" (1959) (App. 49); the claims against the District of Columbia defendants were dismissed because "it is clear that the acts were discretionary and not ministerial" (App. 49); and the claims against the United States were dismissed because "it would appear that the United States is being sued under the Federal Tort Claims Act" and that the plaintiffs had failed to exhaust the required administrative remedies (App. 49). The dismissal was by written order although none of the defendants had filed a motion to dismiss or any other responsive pleading or memorandum of law and although the court had only heard oral arguments on the question of plaintiffs' request for a temporary restraining order. At the conclusion of the oral arguments, the court dismissed the entire complaint "as being frivolous" (App. 41). Thereafter, the District Court entered its four-page order, which was prepared by counsel for the United States (App. 48-50).

The courts below permitted petitioners to proceed in fictitious names to preclude further embarrassment to them and to maintain the action *in forma pauperis* because petitioners were impecunious. This Court's order granting certiorari also granted petitioners leave to proceed *in forma pauperis* in this Court. Petitioners' separate motion for leave to proceed in fictitious names has not been acted upon by this Court. All of the petitioners are Black. (App. 6).

In the Court of Appeals, petitioners moved immediately for summary reversal, and the defendants-appellees

moved for summary affirmance. On January 14, 1971, a panel of the Court of Appeals issued an injunction to preserve the status quo until responses were filed. (App. 54-55). That order did not enjoin members of the Congressional Committee or the United States, but it did prohibit the other defendants from any further publication and distribution of the private information, whether published in the Report or otherwise, so long as those papers or the Report contained the names and the addresses of the pupils or their parents. On March 11, 1971, a panel of the Court of Appeals (Judges Fahy and Leventhal, with Judge Tamm dissenting) continued the earlier injunction but restrained only the further publication or disclosure of the pupils' and their parents' names (442 F.2d 879; App. 57-64). This interim opinion by the Court of Appeals concluded that the petitioners' claim that they would be publicly stigmatized *was a substantial claim* and that the claims of invasion of constitutional privacy, lack of proper legislative purpose to warrant such an invasion, and the broadcasting of names and identities were claims worthy of serious consideration on the merits. The interim opinion by the Court of Appeals also noted that the dimensions of the constitutional issue had been heightened by the recent decision of this Court in *Wisconsin v. Constantineau*, 400 U.S. 433 (January 19, 1971), which held that the official publication of a list of names stigmatizing individuals, without notice or hearing, violated due process of law. Two justices of this Court concluded, in that case, that the list constituted a bill of attainder, a point not reached by the majority.

Thereafter, the parties filed briefs, and the court heard oral arguments, on an expedited schedule. On January 20, 1972, a different panel of the court of appeals (Judge

MacKinnon and Senior Circuit Judge Miller, with Judge Wright dissenting) entered its opinion which petitioners have now brought to this Court for review (App. 67-113).

The result of the lower court's decision was, first, to immunize not only congressmen from suit under the Speech or Debate Clause, but also staff members, consultants, and investigators of a congressional committee, and officials and employees of the Government Printing Office, none of whom were close personal aides of a congressman—all on the basis of the Speech or Debate Clause. Secondly, the lower courts immunized from suit the District of Columbia defendants under the official immunity doctrine. Thirdly, the lower courts also extended the ruling on the official immunity doctrine question to immunize the non-congressmen federal employees, in addition to the immunity granted them under the Speech or Debate Clause (App. 86; text at note 22).

The issues raised in this case are not moot. Only by the continuous protection of the injunction issued by the court below have respondents been restrained from further publication or distribution of the Report containing petitioners' names. By order of the court below, this injunction shall continue in effect until final action by this Court (App. 116). In addition, petitioners still pursue their claim that the violation by the respondents of their common law, constitutional and statutory (42 U.S.C. § 1983) rights allows them to maintain an action for damages against all respondents or, at the least, the non-congressmen respondents.[3]

[3] The Congressional Report must be examined in order to appreciate the full significance of the invasions of privacy it represents. Rather than reprint pertinent parts in the Appendix, which could not be done without risking further invasions of

SUMMARY OF ARGUMENT

The acts of respondents were serious violations of petitioners' right to privacy. The unauthorized disclosure of private, confidential and privileged student records by respondent school officials and the unauthorized procurement and publication of them by the legislative respondents, including petitioners' names and addresses contained in highly embarrassing, scandalous and possibly libelous contexts, violated petitioners' constitutional and common law right of privacy. Accordingly, petitioners have a cause of action for declaratory judgment, injunctive relief and damages. This cause of action was properly brought before the federal judiciary, and the maintenance of the action may be limited only, if at all, by the doctrine of separation of powers, by the Speech or Debate Clause of the Constitution, or by the ancient doctrine of official (sovereign) immunity. None of these impediments exist in this case, singly or in combination, to bar petitioners' action.

The doctrine of separation of powers is inoperative in this case as a restraint upon the judiciary to entertain this action or grant injunctive relief or damages. Judicial deference to other branches of government "cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms." *Watkins v. United States*, 354 U.S. 178, 204 (1957). The separation of powers doctrine does not, of its own force, bar judicial review of congressional investigations. *United States v. Rumely*,

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petitioners' privacy, we have submitted one copy of its pertinent part (pages 210-257) pertaining to the students of Jefferson Junior High School (petitioners herein), in a sealed envelope, together with a letter to the Clerk of this Court requesting that it be made available for inspection only by Court personnel.

345 U.S. 41 (1953), *Kilbourn v. Thompson*, 103 U.S. 168 (1880), *Powell v. McCormack*, 395 U.S. 486 (1969), *Barenblatt v. United States*, 360 U.S. 109 (1959). See also, *Baker v. Carr*, 369 U.S. 186 (1962).

Immunity from suit under the Speech or Debate Clause does not apply in this case to *any* of the respondents, because not even congressmen are protected by the Clause from answering for direct violations of private citizens' constitutional rights. Only valid legislative acts are immunized from judicial scrutiny by the Clause. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), *Kilbourn v. Thompson, supra, Dombrowski v. Eastland*, 387 U.S. 82 (1967), *Powell v. McCormack, supra*, and *Gravel v. United States*, ___U.S.___ (Slip Opinion, June 29, 1972). Here neither the procurement nor the method of obtaining the student records were authorized, and apart from the irregular and unauthorized procedures which violated fundamental precepts of procedural due process, the Constitution itself places limits on congressional inquiries and actions through, for example, the prohibition of bills of attainder and the protection of citizen privacy.

Official (sovereign) immunity is not a bar to the maintenance of this action against either the federal or the District of Columbia respondents. In the District of Columbia the application of the judge-made jurisdictional defense of official immunity has been restricted so that it applies only to discretionary functions and not to ministerial ones; and it has been even further restricted so as to be available as a defense only when judicial redress would jeopardize the quality and efficiency of government itself. *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964), *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted* on a separate issue *sub nom.*

District of Columbia v. Carter, ___U.S.___, 30 L.Ed.2d 161 (1972). To the extent that petitioners' action was dismissed on the grounds of official immunity, without specific determination of whether judicial redress would jeopardize the quality and efficiency of government itself, the dismissal was premature, it was clearly precluded by governing precedent in the District of Columbia, and it failed to dispose of the separate question of liability by the District of Columbia respondents under the Civil Rights Act of 1871 (§ 1, R.S. § 1979, 42 U.S.C. § 1983), and of the federal respondents under the doctrine articulated in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

This Court should reverse the decision of the lower court, declare that petitioners may maintain in federal court their action against each and every respondent, articulate the inapplicability in this case of immunity under the Speech or Debate Clause and the doctrine of separation of powers, and require, upon remand, the application of *stare decisis* principles on the question of official immunity in the District of Columbia.

ARGUMENT

I.

THE RIGHT TO PRIVACY IS A FUNDAMENTAL CONSTITUTIONAL RIGHT WHICH PROTECTS THE CONFIDENTIAL AND PRIVILEGED NATURE OF STUDENT RECORDS AND PAPERS IN PUBLIC SCHOOLS

The petitioners, minor school children and their parents, contend that their right of privacy, based upon the Bill of Rights, has been violated by the unreasonable search, seizure and publication of the highly personal and confidential information included in the hearing report complained of herein.

Such "right of privacy"[4] or "right to be let alone"[5] is a legal recognition of the private and personal sphere belonging to each individual, which our limited government may not transgress. It is a well-established common law right in the United States.[6]

Mr. Justice Brandeis, in his famous dissent in *Olmstead v. United States*, 277 U.S. 438 (1927), gave the right its classic characterization (277 U.S. at 478):

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

The concept of a limited government, around which our Constitution was written, has always included the principle that governmental powers stop short of certain intrusions into the personal life of the citizen. Indeed, this principle represents a basic distinction between an absolute and a limited government. The complete control over the life of the individual which is the hallmark of an

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[4] Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[5] Cooley, *Law of Torts*, 29 (2d ed. 1888).

[6] Prosser, *Privacy*, 41 Calif. L. Rev. 383 (1960); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. Rev. 962 (1964).

absolute government is totally alien to our form of government which safeguards the private sphere belonging to the individual.

The great charter of protection for this private sphere is the Bill of Rights, specifically delineating the principles of a limited government which permeate our Constitution. The Honorable Erwin Griswold has called the right of privacy the "underlying theme of the Bill of Rights."[7]

The concept of individual privacy contained in the Bill of Rights derives from ancient theological and philosophical precepts. Once our civilization made the distinction between the life of the soul and the life of the body, between the realm of God and the realm of Caesar, between inherent and inalienable rights belonging to the people and limited rights granted to a government, it became essential to recognize, in turn, the concept of a private sphere belonging to every individual, in which one may become and remain "himself."[8]

It is the violation by the respondents of this private sphere, as incorporated in our constitutional framework of a limited government, of which petitioning school children and their parents complain in the case at bar.

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[7] Griswold, *The Right To Be Let Alone*, 55 N.w.U.L. Rev. 216 (1960).

[8] *See* John Locke, *The Second Treatise on Civil Government* (Everyman's Library, 1924); Immanuel Kant, *Metaphysical Elements of Justice* (Bobbs-Merrill, 1965); Ralph Waldo Emerson, "Essay on Fate" in *The Conduct of Life* (Dutton, 1899).

A. The Concept of Individual Freedom From Governmental Restraint Is a Venerable Tradition of the Common Law.

Boyd v. United States, 116 U.S. 616 (1886),[9] is the first definitive decision of this Court, interpreting the Fourth and Fifth Amendments, on the basis of a right of privacy theory. *Boyd* was a civil action brought by the government to declare forfeit thirty-five cases of plate glass alleged to have been imported by the Boyd brothers in violation of the customs laws. The district court judge issued a subpoena directing the Boyds to produce an invoice covering a prior shipment of glass. The invoice was an essential element in the government's case. The Boyds complied with the subpoena under protest. The verdict was against the Boyds; but this Court reversed, holding that the doctrines of the Fourth and Fifth Amendments (116 U.S. at 630):

> ... apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. ...

In *Boyd*, a statute existed specifically authorizing the government's action. In the case at bar, only a general, vague House of Representative's Resolution allegedly authorizes the respondents' actions (App. 45-46). In

[9] *Accord, Ex parte Jackson*, 96 U.S. 727 (1878); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); *In re Pacific Railway Commission*, 32 Fed. Rep. 241 (Cir. Ct. Calif. 1887) (Opinion by Mr. Justice Field, sitting by designation); and *Union Pacific Railway Company v. Botsford*, 141 U.S. 250 (1890).

Boyd, a definite governmental interest was at stake in prohibiting customs law violations. The production of the invoice was an integral part of the governmental effort. Here there is no legitimate governmental interest in the use or the publication of the names of minor school children.

The *Boyd* decision was primarily based on the English case, *Entick v. Carrington*, 19 Howells State Trials 1029 (1765), generally regarded as a permanent monument in the development of the British concepts of individual freedom from governmental restraints. The facts in *Entick* are remarkably similar to the facts in this case. There the Secretary of State issued general executive warrants to his messengers, authorizing them to go about the country and to seize persons who were allegedly libelling the sovereign. Entick, a strong critic of the Crown, was the victim of one such general search, during which his seditious publications were impounded. He brought a successful damage action for trespass against the messengers. The verdict was sustained on appeal.

Here the House of Representatives passed a general Resolution authorizing investigations into any agency of the government of the District of Columbia. Allegedly pursuant to this Resolution, an agent of the House Committee[10] obtained numerous documents from the school system without the petitioners' knowledge. These documents included test papers and disciplinary reports which contain highly confidential and personal information concerning the petitioners.

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[10] Respondent Louis Martin was a Sergeant of the District of Columbia Metropolitan Police Department and an investigator of the Committee. Without the benefit of a hearing below, petitioners were unable to ascertain in which capacity he was acting, or under what color of authority he pretended to act, while obtaining the information on which the Report was based.

In *Entick*, Lord Camden concluded that if such sweeping warrants were judicially approved, then (19 Howells State Trials at 1063):

> . . . the secret cabinets and bureaus of every subject in this kingdom will be thrown open to search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

The facts herein represent just as serious an invasion of petitioners' constitutional rights and present grave overtones for our concept of a limited government.

The essence of these early decisions is that the Bill of Rights, specifically the Fourth and Fifth Amendments, also prohibit government action that is not strictly a search or seizure but is an intrusion into the privacy of the individual citizen, whether of his home, his person, or his effects.[11] Such an intrusion is exactly the governmental action of which the petitioning school children and their parents complain to this Court. Petitioners pray this Court to affirm once again the venerable principle of individual freedom from governmental restraint.

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[11] Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 Sup. Ct. Rev. 212.

B. Recent Decisions of This Court Affirm the Constitutional Basis of Individual Privacy

The decisions of this Court have continued the recognition that the concept of individual privacy has a constitutional basis. Individual privacy has been the basic theory of numerous opinions dealing with the First Amendment,[12] the Fourth Amendment,[13] and the Fifth Amendment.[14]

In *Wolf v. Colorado*, 338 U.S. 25 (1949), this Court described the citizen's immunity from unreasonable search and seizure in terms of "the right of privacy." In holding that the Due Process Clause of the Fourteenth Amendment protected a citizen's right of privacy, Mr. Justice Frankfurt wrote for the Court (338 U.S. at 27-28):

> The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a preclude to a search, without authority of the police, did not need the commentary of recent history to be condemned

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[12] *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1951); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Stanley v. Georgia*, 394 U.S. 557 (1969).

[13] *Boyd v. United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727 (1878); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Katz v. United States*, 389 U.S. 347 (1967); *Silverman v. United States*, 365 U.S. 505 (1961); *Camara v. Municipal Court*, 387 U.S. 523 (1967); *United States v. United States District Court*, ___U.S.___, 32 L.Ed. 2d 752 (1972).

[14] *Watkins v. United States*, 354 U.S. 178 (1957).

as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), this Court concluded that a warrantless search by police officers violated the Fourth Amendment, as applied to the States through the Fourteenth Amendment. The Court referred to the right of privacy as "basic to a free society." 367 U.S. at 656.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court held that a state's requiring the production of a membership list violated the petitioners' freedom of association guaranteed by the First Amendment. The Court spoke of the right of privacy as "indispensable" to the preservation of freedom of association. 357 U.S. at 462.

In *Watkins v. United States*, 354 U.S. 178 (1957), this Court overruled a contempt conviction based on the defendant's refusal to answer certain questions before a congressional committee. The Court stated (354 U.S. at 198-199):

> We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.

In *Stanley v. Georgia*, 394 U.S. 557 (1969), this Court found unconstitutional under the First Amendment a Georgia "obscenity" statute. The Court concluded that

the statute represented an unconstitutional governmental intrusion into an individual's privacy.

In *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court held that the Fourth Amendment prohibited a warrantless search of a dwelling for the purposes of a housing code inspection. The Court held that the basic purpose of the Fourth Amendment was to "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials" 387 U.S. at 528.

As recently as its last term, this Court held unconstitutional under the Fourth Amendment electronic surveillance, without a search warrant, for the purposes of protecting against an alleged domestic conspiracy to destroy government property. *United States v. United States District Court*, ___U.S.___, 32 L.Ed. 2d 752 (1972). Mr. Justice Douglas, in a concurring opinion, stated: "The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life." ___U.S. at ___, 32 L.Ed. 2d at 775.

The right of privacy received its most definitive recognition by this Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965). In a seven to two decision, the Court held unconstitutional a state law under which the petitioners were prosecuted for giving married persons information and medical advice on the use of contraceptives. The Court based its holding squarely on the right of privacy which was derived by implication from the specific guarantees of the Bill of Rights. Mr. Justice Douglas cited numerous cases of this Court, including many of those cases cited herein, and concluded that:

> These cases bear witness that the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship

lying within the zone of privacy created by several fundamental constitutional guarantees. 381 U.S. at 485.

Mr. Justice Goldberg, in an opinion which Chief Justice Warren and Mr. Justice Brennan joined, concluded that the right of privacy was one of the fundamental rights which was not explicitly mentioned in the Constitution but which was implicit throughout the entire framework of the Constitution, and thereby guaranteed to the people through the Ninth Amendment. He said (381 U.S. at 494):

> I agree fully with the Court that . . . privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live."

Mr. Justice Harlan concurred in the result, contending that the concept of privacy which the Connecticut statute violated was "implicit in the concept of ordered liberty" which underlies the Due Process Clause. 381 U.S. at 500. Mr. Justice White concurred in the result on the theory that the statute deprived citizens of their liberty without due process of law, as that concept is used in the Fourteenth Amendment. 381 U.S. at 502.

Even though the various justices reached the result by differing routes of Constitutional interpretation, this case clearly stands for the proposition that the right of privacy has a firm constitutional basis. Implicit in our scheme of limited government is the concept that there is a private sphere belonging to each individual which the government is prohibited from breaching.

C. The Facts of This Case Fall Within the Constitutional Protection of the Right of Privacy

The case at bar comes within the constitutionally protected right of privacy, especially when considered against the backdrop of the Fourth Amendment. This Court has repeatedly held that the prohibition against warrantless searches applies to civil actions, *Boyd v. United States, supra; Frank v. Maryland*, 359 U.S. 360 (1959); *Camara v. Municipal Court, supra*; and *See v. Seattle*, 387 U.S. 541 (1967). In addition, this Court has held that the protection of the Fourth Amendment enures to people, not places. *Katz v. United States*, 389 U.S. 347 (1967).

In spite of this constitutional protection, respondents ignored the petitioners' rights. Respondents all participated in obtaining personal and confidential information concerning the petitioners and caused the information to be published in the committee report. This information places petitioners in a harmful and embarrassing light in the public eye, undoubtedly haunting them for the remainder of their lives. Petitioners were not even given notice of the publication. Petitioners did not have the opportunity to challenge the use or the correctness and accuracy of the information.

The publication was not based on a legitimate legislative need, nor was it based on a legitimate legislative interest. One is hard-pressed even to conceive of a legitimate legislative interest in the use of petitioners' names. The best justification given, as set forth by the majority opinion below, is that the use of the names "lends credibility" to the report. (App. 80-81). When considering the invasion of a constitutional right, the justification of "lending credibility" cannot be allowed to

stand against the citizen's interest in preserving his privacy.

In short, petitioners contend that the respondents trampled, rough-shod, over their constitutional rights; that respondents exhibited no feeling or sensitivity for petitioners' rights; and that this Court should not allow such a gross violation of constitutional privilege to remain unremedied.

D. Respondents' Violation of Petitioners' Constitutional Rights is Exacerbated by the Fact that Petitioners Are Minor School Children

Special consideration should be given to the dissemination of information concerning children. The many governmental agencies and private groups involved in guiding our children through their formative years must necessarily collect extensive personal data in order to accomplish their tasks effectively. Without careful control of this personal data, children may be haunted for their entire lives as a result of childhood indiscretions or adjustment problems. Our judicial system surely provides protection from having to live with a constant fear of disclosure of personal information. (Dissenting Opinion of Judge Wright, App. 109).

Petitioning school children are the victims of just such a wrongful dissemination of personal data. Their names have been published abroad in a House Committee report, with no apparent substantial public interest in that information. Yet they did not voluntarily place themselves in the public eye. *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Time, Inc. v. Hill*, 385 U.S. 374 (1966). The spectre of this report will doubtless follow

them for the rest of their lives, seriously damaging their educational and employment opportunities, not to mention their mental and emotional development.[15]

This Court has previously recognized the extraordinary care which must be accorded children when evaluating the exigencies of governmental action against their constitutional rights. *Shelton v. Tucker*, 364 U.S. 479 (1960); *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969); and *In Re Gault*, 387 U.S. 1 (1967).

The special safeguards surrounding the dissemination of the records of juvenile proceedings is an example.[16] For the District of Columbia, Congress has passed an extensive statute carefully guaranteeing the confidentiality of such records.[17] Congress even provided that disclosure of records in violation of the statute would constitute a misdemeanor, punishable by a fine of $250 or imprisonment for ninety days, or both.[18] The compilation of a juvenile record is surrounded by judicial safeguards which do much to insure its reliability and accuracy. *In Re Gault, supra*. Here, however, the rights of the petitioners were completely trampled, with no regard for the completeness or accuracy of the information contained in the report.

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[15] Knovitz, *Privacy and the Law: A Philosophical Prelude*, 31 Law & Contemp. Prob. 272 (1966); Jourard, *Some Psychological Aspects of Privacy*, 31 Law & Contemp. Prob. 307 (1966); and Fried, *Privacy*, 77 Yale L.J. 475 (1968).

[16] Many states have statutes which restrict the dissemination of school records. Generally, there is a special ban on the use of the names of students. See, e.g., Cal. Educ. Code § 10751 (1969).

[17] D.C. Code §§ 16-2330 to 16-2334 (V Supp. 1972).

[18] D.C. Code §16-2335 (V Supp. 1972).

An additional factor in the case at bar weighs heavily in favor of special consideration for the violation of the petitioners' constitutionally protected right of privacy. The students attend school under a compulsory attendance statute[19] and, as a result, suffer a considerable diminution of their freedom. (Dissenting Opinion of Judge Wright, App. pp. 106-108). Thus any infringements on the students' privacy should be carefully scrutinized.[20] In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), this Court definitively declared that students are "persons" under the Constitution, that they are "possessed of fundamental rights" which must be respected, and that schools "may not be enclaves of totalitarianism." 393 U.S. at 511. Citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960), the Court declared that "... the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." 393 U.S. at 512.

The educational system forces the student not only to attend school but also to reveal his abilities, desires, and innermost thoughts to school authorities in numerous tests of aptitude and attitudes. The educational system is, as a result, a repository of intimate personal, potentially embarrassing information. Under such a compulsory system, the school has an added responsibility to its students and its community to act in a carefully discriminating manner in controlling and disclosing any information concerning students. The school system must

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[19] D.C. Code §31-201 (1967 ed.)

[20] *See* Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. Pa. L. Rev. 545 (1971).

never disperse this private information without careful consideration of the student's interests. Our government must not force the school system to violate such a confidential relationship. This Court set forth these considerations in *West Virginia v. Barnette*, 319 U.S. 624, 637 (1942):

> That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The actions of the respondents are certainly not conducive to protecting the rights of the student petitioners or to fostering in their minds the respect due our constitutional freedoms. Their actions degrade petitioners and have the potential for frustrating petitioners' efforts to obtain an education and thereby to continue their development as self-respecting members of society. Respondents were purportedly concerned with the quality of education in the District of Columbia. Their actions in the investigation, however, had a direct and debilitating effect on the education of the petitioners.

If Congressmen and school officials can ignore important constitutional rights with impunity, what lesson does our system of government teach?

E. Petitioners Have A Common Law Action for Damages for Invasion of Privacy.

The development of a remedy for the invasion of a constitutional right has often presented this Court with difficulties. Recently, however, this Court affirmed the ancient principle that a private citizen can maintain an action for damages for an invasion of his constitutional

rights. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The petitioner in *Bivens* was also suing for an invasion of privacy, consequent to a warrantless search and arrest. Mr. Justice Brennan, writing for the Court, said (403 U.S. at 395):

> That damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. (Citations omitted).

Certainly, the right to sue for damages is a hoary principle. It was the basis for the important English decision *Entick v. Carrington, supra*, wherein the plaintiff was allowed to maintain an action for damages for an illegal search and seizure of his personal papers. In fashioning the exclusionary rule as a remedy for a violation of the Fourth Amendment, this Court referred to the traditional right to maintain an action in damages for a breach of the right of privacy guaranteed by the Amendment. See, *e.g. Wolf v. Colorado*, 338 U.S. 25, 30-31 (1949).

The petitioners' right to maintain an action for damages is affirmed by the controlling common law in the District of Columbia on which the complaint herein is based. In *Peed v. Washington Times Company*, 55 Wash. L. Rep. 182 (1927), a District of Columbia court ruled in favor of a plaintiff who was suing for invasion of privacy as a result of a newspaper's unauthorized use of a picture showing the plaintiff after she had been overcome by gas fumes. The court defined the right as " . . . the right of an individual to withhold himself and his property from public scrutiny, if he so chooses." 55 Wash. L. Rep. at 183.

Various courts in the District of Columbia have reaffirmed this common law right, *Peay v. Curtis Publishing Company*, 78 F. Supp. 305 (D.C. 1948); *Afro-American Publishing Company v. Jaffee*, 366 F.2d 649 (D.C. Cir. 1966); and *Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 947 (1969).

In *Bernstein v. National Broadcasting Company*, 129 F. Supp. 817, *aff'd*, 232 F.2d 369 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 945 (1956), the court set out the elements of the tort. To recover, the plaintiff must be able to show an unwarranted publication, without a waiver, of his private affairs in which the public has no legitimate concern. The publication must be of such nature as would cause mental suffering, shame, or humiliation to a reasonable person.

The limited facts which are before this Court indicate that there is a strong likelihood that petitioning school children would have been able to recover under the common law in the District of Columbia, if the trial judge had not summarily dismissed the complaint. The respondents admit that the petitioners did not waive any right to publication to their names in the hearing report. In fact, petitioners did not even know that their names were in the report until the report had been printed. The respondents have shown no legitimate public interest in the names of the petitioning school children sufficient to warrant the publication. The inclusion of the test papers and disciplinary reports are certainly of such a nature to cause mental shame, suffering, or humiliation, especially to sensitive young children and their families. Petitioners' argument that there is a reasonable basis to conclude that they may recover if allowed to prove their claim is beyond question.

Chief Justice Marshall once wrote for the Court:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Petitioners cannot present a more concise statement of their claim herein.

F. Conclusion

The District Court did not give petitioners an opportunity to prove their claim that respondents violated their constitutional and common law right of privacy, the legal basis for which is outlined above. Both courts below held that various immunity doctrines, particularly those doctrines applying to congressmen, precluded a judicial determination of petitioners' claim. Petitioners contend herein that congressmen and other government officials are not free to violate the constitutional rights of private citizens. The Honorable Edwin Griswold precisely expressed this limitation on congressional action: "Congressmen and Senators are not magistrates with roving commissions to go about the length and breadth of the land hailing people before them to respond to what they will."[21]

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[21]Griswold, *The Right To Be Let Alone*, 55 N.w.U.L. Rev. 216, 221 (1960).

II.

THE DOCTRINE OF SEPARATION OF POWERS DOES NOT APPLY IN THIS CASE TO PERMIT JUDICIAL AVOIDANCE OF THE CONTROVERSIES PRESENTED

On several occasions this Court has expressed with unmistakeable clarity the doctrine that congressional investigations, including subsidiary questions of investigatory methods and authority, can and must be scrutinized in appropriate cases. Deference to the powers and duties of a coordinate branch of government "cannot yield to an unnecessary and unreasonable dissipation of precious constitutional freedoms." *Watkins v. United States*, 354 U.S. 178, 204 (1957). The mere possibility of conflict cannot justify avoidance of the judiciary's constitutional duty to protect and insure the rights of citizens. *Powell v. McCormack*, 395 U.S. 486 (1969); *Barenblatt v. United States*, 360 U.S. 109 (1959). See also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Kilbourn v. Thompson*, 103 U.S. 168 (1880); and *United States v. Rumely*, 345 U.S. 41 (1953).

In *Kilbourn v. Thompson, supra*, quoting from Mr. Justice Hoar in *Burnham v. Morrissey*, 14 Gray 226 (Mass. 1859), this Court said (103 U.S. at 199):

> The House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court.... Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme; and it is the province

> and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution. . . .

More recently, in *Powell v. McCormack, supra,* this Court reaffirmed its role as the guardian of individual rights within the checks and balances system of our government. In *Powell,* this Court held that the activities of the House of Representatives in excluding a member was not an activity entrusted by the Constitution solely to the House and, therefore, the Court concluded that judicial consideration was not foreclosed.

The *Powell* decision reiterated the teaching of *Baker v. Carr,* 369 U.S. 186 (1962), that the separation of powers doctrine bars judicial scrutiny of legislative action *only* where at least one of the following factors is present (369 U.S. at 217):

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

That the present controversy does not fall within the *Baker v. Carr* formulation is made clear in *Powell, supra.*

In *Powell*, this Court applied the principles annunciated in *Baker* in a federal context, holding that the separation of powers doctrine did not bar judicial consideration of a challenge to the attempted exclusion of a congressman by the House of Representatives. The Court held that since a judicial determination of Congressman Powell's rights required "no more than an interpretation of the Constitution," the controversy involved neither "an initial policy determination of a kind clearly for nonjudicial discretion, nor a lack of respect due a coordinate branch of government." 395 U.S. at 548-549. The Court then concluded (395 U.S. at 548-549):

> "... Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility. See *United States v. Brown*, 381 U.S. 437, 462 (1965); *Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 613-614 (1952) (Frankfurter, J., concurring); *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting)." (Footnote omitted).

Thus, although the power of Congress to conduct investigations and to publish its findings is broad, it is not unlimited. As stated in *Watkins, supra* (354 U.S. 198-199):

> We cannot simply assume ...that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy....

Where congressional investigations and reports, no matter how laudable their objectives, encroach upon constitutionally protected liberties, an overriding governmental interest must affirmatively be shown. *Barenblatt v. United States, supra,* 360 U.S. at 126-127. See also, *Stamler v. Willis,* 415 F.2d 1365 (7th Cir. 1969), *cert. denied,* 399 U.S. 924 (1970), where the Court of Appeals reversed the dismissal of a civil action seeking declaratory and injunctive relief alleging misconduct on the part of a House Committee (415 F.2d at 1369-1370):

> "We conclude that plaintiffs' claims should be considered on the merits even though a coordinate branch of the Government is involved. The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government. (Footnote omitted).

This same necessity for judicial intervention was observed by Judge Medina, in *Wolff v. Selective Service Local Board No. 16,* 372 F.2d 817, 824-825 (2d Cir. 1967):

> Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation but have nullified the unconstitutional action and required the Government to start in the first instance with a statute or interpretation that will not so overhang free expression that the legitimate exercise of constitutionally protected rights is suppressed.

Petitioners have no other forum in which to assert their constitutional rights, and judicial intervention is therefore imperative. Petitioners had no advance notice that their names would be published in unfavorable and highly embarrassing contexts, and they had no oppor-

tunity to persuade Congress, the Committee, or individual committee members from taking this action. In *Yellen v. United States*, 374 U.S. 109 (1963), this Court held that a lack of proper congressional procedures or action is sometimes sufficient to justify protective action by the Courts. In this case, petitioners' names were printed in the report without their knowledge, and without notice to them or to any other persons who might have protected their interests.[22] Ten years ago this Court concluded that "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1962). The federal judiciary must continue its historic intervention and provision of remedies in cases of unconstitutional deprivations through legislative investigations, and in this case it should consider the substantial claims of petitioners who are children, poor and black, and who did nothing to deserve the treatment they received except attend public schools as the law requires.

This Court has emphasized the vigilant protection it will give to the constitutional rights of children. *Shelton v. Tucker, supra; Tinker v. Des Moines Community School District, supra.* The judiciary cannot shun its proper role of adjudicating this controversy "if we are not to strangle the free mind at its source and teach youth to discount important principles of our govern-

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[22] As noted, *supra*, petitioners filed a motion to sever and dismiss as to several of the congressmen respondents on the grounds that they opposed the distribution of the report so long as the petitioners' names remained therein and that they would have voted against the publication of the report had they been given an opportunity to do so.

ment as mere platitudes." *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943).

III.

THE SPEECH OR DEBATE CLAUSE IMMUNIZES NEITHER LEGISLATIVE AIDES NOR CONGRESSMEN THEMSELVES FROM PRIVATE SUIT ALLEGING UNCONSTITUTIONAL INVASIONS OF PRIVACY, PUBLICATION OF A BILL OF ATTAINDER AND DENIAL OF PROCEDURAL DUE PROCESS, WITHOUT EVEN PRIMA FACIA AUTHORIZATION BY HOUSE RESOLUTION

On several occasions, beginning in 1880, this Court has reviewed the scope and application of the Speech or Debate Clause when the federal judiciary has been called upon to adjudicate claims that Congressmen, Senators, and legislative employees have acted unlawfully or unconstitutionally. In *Kilbourn v. Thompson*, 103 U.S. 168 (1880), Kilbourn was arrested and imprisoned pursuant to a House Resolution for his refusal to testify at a Committee hearing. Claiming false imprisonment, Kilbourn sued the members of the Committee and the Sergeant-at-Arms who had executed the warrant. This Court declared the resolution unconstitutional and held that the Sergeant-at-Arms was not protected from suit by the Speech or Debate Clause, even though Kilbourn's complaint was held to be properly dismissed as to the Congressmen. Similarly, in *Dombrowski v. Eastland*, 387 U.S. 82 (1967), this Court held that the Speech or Debate Clause did not immunize the chief counsel of the Senate Internal Security Subcommittee from suit alleging violation of Fourth Amendment rights, and in *Powell v. McCormack*, 395 U.S. 486 (1969), this Court held that an action by an excluded member of Congress seeking his

seat, restoration of his seniority privileges and back pay was maintainable against House employees. Most recently, in *Gravel v. United States*, ___U.S.___ (Slip Opinion, June 29, 1972), this Court declared that:

> . . . no prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property *or invade the privacy of a citizen*. Neither they nor their aides should be immune from liability or questioning in such circumstances. Such acts are no more essential to legislating than the conduct held unprotected in *United States v. Johnson*, 383 U.S. 169 (1966). *Gravel, supra*, ___U.S. at___ (Slip Opinion at 14) (Footnote omitted, emphasis added).

This Court concluded in *Gravel*, after reviewing *Kilbourn*, *Dombrowski*, and *Powell*, that "[t]he three cases reflected a decidedly jaundiced view towards extending the clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." ___U.S. at___ (Slip Opinion at 13-14).

Part II of the *Gravel* decision (and the separate opinions) reviewed extensively the pre-constitutional antecedents of the Speech or Debate privilege, and in the Brief for the United States filed by the Solicitor General this pre-constitutional history and the intent of the framers were summarized (pp. 17-22, 22-24), as part of the Solicitor's argument that only Senators and Representatives are privileged under the Clause, and that because of the pre-constitutional history there was a conscious rejection by the framers of any privilege on

behalf of other persons whom legislators from time to time might wish to bring within the ambit of their own protection. This limitation has been carried forward in decisions of this Court, for example, in *Powell* and *Dombrowski, supra:*

> This Court has held, however, that this doctrine [of legislative immunity] is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves.

Dombrowski, 387 U.S. at 85.

We submit that the scope of the Speech or Debate Clause privilege, as originally intended by the framers in light of preconstitutional history, and as carried forward by this Court in the *Kilbourn-Dombrowski-Powell-Gravel* line of cases is not such as to provide the respondents here with any proper claim, absolute or qualified, to be immune from answering before the federal judiciary to the claims of petitioners. Certainly this is so under the circumstances of this case, where the actions of committee personnel were not authorized, they were unconstitutional, they were completely outside the outer perimeter of their scope of authority, and they were conducted in a surreptious and clandestine manner calculated to avoid notice to petitioners that their rights were being violated until after the series of unconstitutional and unauthorized actions had been consummated through an irretrievable publication and dissemination of the committee report.

A. Neither the Obtaining Nor the Method of Obtaining and Publishing Petitioners' Private, Confidential and Privileged School Records Were Protected Legislative Acts Because They Were Not Authorized by the House Resolution, and Because the Acts Were Unconstitutional

The *Gravel* decision highlighted an element of analysis in cases involving the Speech or Debate Clause which had not been emphasized in earlier decisions, namely, an analysis of the question of whether the acts complained of are "protected legislative" acts. If so, the congressmen who perform them are immunized under this Speech or Debate Clause, as are legislative personnel insofar as their conduct would constitute protected legislative acts if performed by a member himself. As demonstrated above, and in Part I of this Brief, the acts complained of here were not "protected legislative acts" because they were direct constitutional violations; however, an alternative question for decision is whether the nature of the legislative investigation was authorized by the House Resolution, and more particularly, whether the student records and papers which were seized and published, and the method of their procurement, were authorized. *Watkins v. United States*, 354 U.S. 178 (1957) (see especially, Frankfurter, J., concurring opinion); *United States v. Rumely*, 345 U.S. 41 (1953); *Barenblatt v. United States*, 360 U.S. 109 (1959).

In *United States v. Rumely, supra*, this Court reviewed the scope of a Congressional resolution authorizing a committee to investigate lobbying activities and held, according to the terms of the authorizing resolution, that the Committee had no authority to compel the production of information sought from a witness. Accordingly, the contempt conviction of the witness was

reversed by the Court of Appeals, which action was affirmed by this Court.[23] In this case, of course, there could be no question about the right or duty of either the teacher or principal at the Jefferson Junior High School to refuse the production of documents requested by the committee investigator.[24]

The Resolution involved here [H. Res. 76, 91st Cong., 1st Sess., Feb. 5, 1969 (App. 45-46)], while it authorized procurement of documents relevant to a valid investigation, did not authorize the Committee staff to utilize the services of a District of Columbia policeman, apparently moonlighting as a free-lance investigator for the House Committee staff, surreptitiously to obtain the private and confidential documents involved here, or if so, to obtain the documents in the fashion in which they were obtained. It is clear from the resolution itself that it contained no such peculiar authority:

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[23] See also, *Watkins v. United States, supra,* especially Justice Frankfurter's concurring opinion wherein he states that the scope of a congressional committee's inquiry must be defined with sufficient clarity to safeguard a witness from the hazards of vagueness in the enforcement of criminal process.

[24] The majority opinion of the court below (App. 90) made the assumption that, "the failure of an official to cooperate when matters under his control are being examined by a congressional committee would amount to malfeasance in office." We disagree. "No man in this country is so high that he is above the law. No officer of the law may set the law at defiance, with impunity. All the officers of the government, from the highest to the lowest are creatures of the law and are bound to obey it." *United States v. Lee,* 106 U.S. 196 (1882). It is the duty of any governmental official to *refuse* to cooperate in an unauthorized, unconstitutional inquisition into private, confidential and privileged student records.

> For the purpose of carrying out this resolution the Committee or subcommittee is authorized to sit and act during the present congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, *to hold such hearings, and to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents as it deems necessary;* . . . . Id. (App. 45, emphasis added).

While the Resolution authorized the obtaining or production of documents, "by subpoena or otherwise," the plain language of the Resolution specifically limited the method and circumstances of document production or procurement *to formal procedures during actual hearings of the Committee or subcommittee.* Both the complaint (para. 7, App. 9) and the statement of counsel for petitioners before the District Court (Tr. 11, App. 27) clearly alleged that the obtaining of the documents in question was not at or pursuant to formal hearings; rather, it was through surreptitious and clandestine private meetings of the Committee's investigator with a teacher and the principal of the Jefferson Junior High School.

In addition to the fact that the authorizing Resolution did not permit the acquisition of documents by the methods used by respondents Martin and Little, Rule XI 27(m) of the House Rules provides safeguards when investigatory hearings are being conducted by a House Committee. Rule XI 27(m) provides:

> If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall–
>
> (1) receive such evidence or testimony in executive sessions;

(2) afford such person an opportunity voluntarily to appear as a witness; and
(3) receive and dispose of requests from such person to subpena [sic] additional witnesses.

The fact that the information identifying petitioners as criminals, dunces, class-cutters, disciplinary problems or sexually promiscious was obtained by surreptitious investigation rather than in open hearing is all the more reason why, at the least, the protections set forth in Rule XI 27(m) should have been applied. None of the school children mentioned in the Report have ever had the chance to refute the unproven allegations in their school records that they were sexually promiscious or thiefs, nor were they given an opportunity to demonstrate that their school attendance records should reflect valid reasons of health or otherwise which contributed to their inattendance. But most importantly, neither the students nor their parents were given a chance to contest, before the fact, the unfaithful actions of school personnel in divulging the documents, or to seek to obtain from the Committee or any of its members minimal protections of their privacy. Basic opportunities for fair play and procedural due process were never accorded to these young people in the District of Columbia school system. Certainly, a document alleging that a named child "is involved in the loss of fifty cents" (Report, p. 256), or "invited a male substitute [teacher] to have sexual relations with her by gapping her legs open for enticement" (Report, p. 256) is such that it would tend to defame, degrade or incriminate that child.

The decision by the Court of Appeals concluded that the actions of the Congressional respondents were authorized—that they were acting within their "sphere of legitimate legislative activity." Although the lower court's

opinion recited this as the standard, citing *Tenney v. Brandhove*, 341 U.S. 367 (1951) (see App. 79-80), the lower court engaged in no analysis whatever of the standard as applied to this case.[25]

The opinion merely recited the standard and reached a conclusion. Nor did the Court of Appeals analyze the question of whether Rule XI 27(m) of the House of Representatives authorized the method by which the documents were obtained and published (App. 75-77, Footnote 10). In fact, the lower court expressly refused to decide this question, stating that the question "was not properly asserted" in the District Court. Relying upon *Hormel v. Helvering*, 312 U.S. 552 (1941), and earlier decisions of this Court, the opinion below found that petitioners had not "demonstrated the existence of any exceptional circumstances which might warrant divergence" from the general principle announced in *Hormel*—that questions be presented to lower courts prior to analysis by the Supreme Court. However, the avoidance by the Court of Appeals of making a decision on this issue was premised upon a complete mischaracterization of the question.

A distinction must be made between the question of whether committee personnel were authorized under the

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[25] The lower court further made the inaccurate observation that petitioners had not contended that any of the Federal legislative employees had acted outside the sphere of their official duties (App. 83), despite the clear allegations of the complaint (See, *e.g.*, Complaint, paras. 10, 13 and 14, App. 9-11) which included the contention that the publication of petitioners' names by the Congressional defendants "was wholly devoid of any valid legislative purpose" (Complaint, para. 10), and allegations of unconstitutional actions in the procurement of the student records and papers.

House Resolution to obtain the documents at all, or in the manner in which they were obtained, and the question of whether the documents were subsequently inserted into the committee report in violation of Rule XI 27(m). A proper characterization of the manner and timeliness of the presentation by petitioners of these two somewhat related questions requires an understanding of the extremely summary manner in which petitioners were treated in the District Court. Petitioners filed the complaint on January 8, 1971 and on the same day, at 4:30 p.m. the court heard petitioners' motion for a temporary restraining order. The hearing lasted less than one hour, adjourning at 5:20 p.m., during which the District Court dismissed the complaint, *sua sponte*, as "frivolous," without a motion to dismiss, a motion for summary judgment, or any other responsive pleading having been filed by any of the defendants. Petitioners were thus put in the untenable position of having no advance notice whatever that the hearing on their motion for a temporary restraining order would result in an opportunity of only a few minutes' duration to present rejoinder arguments.

The Court of Appeals' refusal to examine and decide on their merits the important questions of whether the House Resolution authorized the obtaining of the documents in question or the method of their procurement, and the question of whether House Rule XI 27(m) had been violated, for the reason that the issue "was never raised in the District Court," failed to recognize the exceptional circumstances appearing clearly on the record.

> Rules of Practice and Procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice

> under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice.

Hormel, supra, 312 U.S. at 557. This case does present exceptional circumstances which were totally beyond the control of petitioners. After all, petitioners were never given an opportunity in the District Court to address these questions. Close analysis demonstrates that they are essentially rebuttal responses to defenses asserted by the respondents in the context of a *sua sponte* dismissal of the complaint by the District Court which was hardly forseeable.

When the respondents made their oral presentation in the District Court that they were immune from liability, and before the court contemplated dismissal, the court should have examined several other issues not directly relevant to the question of temporary injunctive relief, preferably on the basis of a written motion to dismiss whereby petitioners would have had the opportunity to develop fully their rebuttal arguments.

Respondents lacked the authority to seize petitioners' private school records in the manner employed, and they breached the Rule of the House which would have provided some minimal protection to petitioners' privacy. These questions were briefed and argued at the earliest opportunity. This Court should recognize the congressional respondents' gross usurpation of unconstitutional authority, should recognize their failure to accord the minimal protections of privacy required by the Rules of the House and should declare, at the least, that petitioners are entitled to demonstrate the inapplicability

of official immunity or Speech or Debate Clause immunity in this case. The federal respondents acted beyond the scope of their authority, *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), and beyond the outer perimeter of their line of duty, *Barr v. Matteo*, 360 U.S. 564 (1959). Their conduct, therefore, cannot constitute protected legislative acts, and they cannot be shielded by the Speech or Debate Clause.

> No man in this country is so high that he is above the law. No officer of the law may set the law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man, who by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.
>
> Courts of justice are established not only to decide upon the controverted rights of the citizens as against each other, but also upon the rights in controversy between them and the Government,
>
> . . . .

United States v. Lee, 106 U.S. 196, 220 (1882).

B. The Procurement and Publication of Petitioners' School Records Were Not Legislative Acts and Therefore Not Protected from Judicial Scrutiny, and to the Extend That They May Be Considered To Be Legislative Acts They Are Subject to Judicial Scrutiny Through Private Suit Because the Actions Constituted or Were Tantamount to a Bill of Attainder and Involved a Substantial Violation of Petitioners' Right to Due Process of Law.

To the extent that this Court's recent decision in *Gravel, supra,* speaks to the questions presented in this case, it would appear that an additional threshold question on the issue of Speech or Debate Clause immunity is the question of whether the actions complained of by petitioners were "protected legislative acts." As shown above in Parts I and III, the actions cannot constitute protected legislative acts because they were plainly unconstitutional and without proper legislative authority. In addition, the Constitution itself contains an express prohibition of bills of attainder, thereby imposing an inherent limitation on the scope of Speech or Debate Clause immunity.

The publication by the House of Representatives of the Committee Report containing petitioners' names constitutes a bill of attainder. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri,* 71 U.S. (4 Wall) 277, 323 (1867). There can be no question but that the publication of the names of students tied to absentee lists, failing test papers, disciplinary memoranda alleging sexual immorality and delinquency, and other private and confidential student records, inflicts punishment upon the student. The punishment consists of affixing a public

badge of disgrace and dishonor upon a person's good name, reputation and integrity, when identified, without trial, as a dunce, a juvenile delinquent, or as sexually promiscuous. Such punishment is prohibited by the Constitution of the United States, Article I, Section 9, which provides that "No bill of attainder or ex post facto law shall be passed."

The Supreme Court has spoken to attempts by the legislature to punish citizens by such bills and has specifically prohibited them. *Cummings v. Missouri, supra; United States v. Lovett,* 328 U.S. 303 (1946).

The report is, in the recent words of former Chief Justice Warren, "the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown,* 381 U.S. 437, 447 (1965). The constitutional prohibition against the bill of attainder has a special and demanding importance in this case. The "reasons for its inclusion in the Constitution and the evils it was designed to eliminate" (*Brown, supra,* at 442), are particularly germane to the issues raised in this case. As recalled by the Court in *Brown:*

> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature. 381 U.S. at 442.

The doctrine of separation of powers, therefore, completely contrary to the lower court's assumption, requires judicial intervention to strike down the action of

Congress in this case as a "legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri, supra,* 71 U.S. at 323. As was pointed out in *Brown* (381 U.S. at 445):

> The Bill of Attainder clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framer's belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of and levying appropriate punishment upon, specific persons.

Consequently, a bill of attainder generates a special and unique demand on the court—a compulsion more urgent and imperative than even the striking down of an unconstitutional statute. The reason is simple: a bill of attainder represents usurpation by the legislature of the functions assigned to the judiciary. The integrity of the judicial function itself is transgressed.[26] In *United States v. Lovett, supra,* this Court, again facing a challenge to

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[26]The intensity of the opposition of the Framers of the Constitution to bills of attainder has been especially noted by Justice Black: "Are there circumstances under which Congress could, after nothing more than a legislative bill of attainder, take away a man's life, liberty, or property? Hostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal government. They wanted to remove any possibility of such proceedings anywhere in this country. This is not strange in view of the fact that they were much closer than we are to the great Act of Attainder by the Irish Parliament, in 1688, which condemned between two and three thousand men, women, and children to exile or death without anything that even resembled a trial." Black, "The Bill of Rights and the Federal Government" in E. Cahn, Ed., *The Great Rights,* at 57 (1963).

punitive action directed against named individuals, reminded us that (328 U.S. at 318):

> When the Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trial and punishments were too dangerous to liberty to exist in the nation of free man they envisioned. And so they proscribed bills of attainder.

In the words of Justice Black for the Court in *Lovett*, this Court has no alternative but to say that "as much as we regret to declare" that the action by the congressional respondents violates the Constitution, "we have no alternative here." *Lovett, supra*, at 318.

As recently as the last term of this Court, the Constitutional proscription against bills of attainder was recalled by two justices of the Court in a case remarkably similar to this case. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), this Court ruled that the posting of names of persons who were not to be served alcoholic beverages in public establishments, under the authority of a state statute, was a violation of the requirements of procedural due process. While the due process considerations in *Constantineau* derived from the Fourteenth Amendment, the same considerations under the Fifth Amendment apply in this case involving federal and District of Columbia actions. But of added significance in *Constantineau* is that Mr. Justice Black, joined by Mr. Justice Blackmun, dissenting on different grounds (abstention), stated (440 U.S. at 444):

> The effect of such sweeping powers, if there is nothing else in the State's law to limit them, is practically the same as that of an old common-law bill of attainder against which our forebearers had such an abhorrence that they forbade it in Art. I,

§ 9, of the Constitution. See, e.g., *United States v. Lovett*, 328 U.S. 303 (1946). And here the Wisconsin law purports on its face to place such arbitrary and tyrannical power in the hands of minor officers and others that these modern bills of attainder can be issued ex parte, without notice or hearing of any kind or character.

IV.

THE JUDICIAL DOCTRINE OF OFFICIAL IMMUNITY IS NOT AVAILABLE TO ANY OF THE RESPONDENTS

Petitioners' complaint in the District Court presented primarily a case or controversy under the Constitution of the United States, and under the Civil Rights Act of 1871 (42 U.S.C. § 1983). The theory of the case is that all of the respondents violated petitioners' constitutional right to privacy warranting a declaratory judgment, injunctive relief and damages. Petitioners also contend that their action is maintainable against the federal respondents pursuant to the federal cause of action for damages articulated by this Court in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971);[27] that their

[27] When read together with *Wheeldin v. Wheeler, supra, Bivens* stands clearly for the propositions that the respondents here can be called to account before the federal judiciary on a federal cause of action for damages based upon their unconstitutional conduct, and that the scope of their legitimate authority, if any, must be examined. While the Court in *Bivens* articulated a federal cause of action for violations of citizens' right of privacy which we submit is controlling in this case, *Wheeldin* expressly stated that a congressional respondent can claim official immunity only if the conduct in question was performed within the scope of his authority. 373 U.S. 647 at 650-651. Justice Brennan's dissenting opinion in *Wheeldin*, observed that the official immunity announced in *Barr v. Matteo*, 360 U.S. 564, 575 (1969) is available only when the

action is maintainable against the District of Columbia respondents under the Civil Rights Act of 1871 because of the violation by these respondents of petitioners' constitutional rights under color of their state authority;[28] and that their action is maintainable as to all respondents on a common law tort cause of action (right of privacy) on the theory that the respondents were acting on their own, clearly beyond the outer perimeter of their rightful authority.

The lower courts in this case clothed the respondents with official (sovereign) immunity upon finding that they acted within the scope of their authority, but in doing so, the District Court precluded any meaningful discussion of the issue by its summary dismissal of the complaint, and the Court of Appeals affirmed that dismissal on the basis of official immunity. The Court of Appeals did not examine with any specificity petitioners' claim that respondents were not acting within the scope of their authority, and cannot so act when conduct is unconstitutional; and the Court of Appeals simply assumed (App. 90) that all of the respondents "have only

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governmental officer was acting within the outer perimeter of his line of duty. Justice Brennan observed (373 U.S. at 647) that "it has never been suggested that the immunity reaches beyond that perimeter, so as to shield the federal officer acting wholly on his own. A federal officer remains liable for acts committed 'manifestly or palpably beyond his authority.' *Spaulding v. Vilas*, 161 U.S. 483; . . . " See also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); and *Bell v. Hood*, 327 U.S. 678 (1946).

[28] The District of Columbia is a "State or Territory" within the meaning of Section 1983 (Civil Rights Act of 1871 §1, R.S. §1979), *Hurd v. Hodge*, 334 U.S. 24 (1948); *Talbott v. Silver Bow County*, 139 U.S. 438 (1891); and *Sewell v. Pegelow*, 291 F.2d 196 (4th Cir. 1961). The Civil Rights Act of 1871 protects the constitutional right to privacy, *York v. Story*, 324 F.2d 450 (9th Cir. 1963), and the constitutionality guaranteed right to due process, *Barnes v. Merritt*, 376 F.2d 8 (5th Cir. 1967).

engaged in official conduct in furtherance of a duly authorized congressional investigation." This crucial conclusion merely begs the question. We submit that the doctrine of official immunity is wholly inoperative in this case, and in any event, that the doctrine was prematurely applied by the lower courts in direct violation of controlling precedent in the District of Columbia, which, in this area of judge-made immunity, has undergone substantial modifications during the past ten years by District of Columbia courts. Those modifications preclude the application of the official immunity doctrine in most of the classes of cases to which it had theretofore been applied. At the time this case was pending in the lower courts, the doctrine applied only to discretionary conduct by officials acting within the scope of their authority, and only upon a specific judicial determination that judicial redress would jeopardize the quality and efficiency of legitimate governmental activity. *Elgin v. District of Columbia*, 337 F.2d 152 (D.C. Cir. 1964); *Spencer v. General Hospital*, 425 F.2d 479 (D.C. Cir. 1969) (In Banc); *Graham v. District of Columbia*, 433 F.2d 536 (D.C. Cir. 1970); and *Carter v. Carlson*, 447 F.2d 358 (D.C. Cir. 1971), *cert. granted* on a separate issue,[29] *sub nom. District of Columbia v. Carter*, ___U.S.___, 30 L.Ed.2d 161 (1972).

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[29] The questions presented in *District of Columbia v. Carter* do not include the District of Columbia modification in the application of the official immunity doctrine. The only question presented in *Carter* in this Court is whether the District of Columbia is a "person" within the meaning of the Civil Rights Act of 1871, 42 U.S.C. §1983, such as to permit the application of the statutory remedy against the District of Columbia directly, in addition to its application, under the doctrine of respondeat superior, for torts committed by officials and employees of the District of Columbia government.

In *Elgin v. District of Columbia, supra,* the United States Court of Appeals for the District of Columbia Circuit was presented with a lower court dismissal, prior to trial, of a complaint alleging negligence by the District of Columbia in failing to provide or maintain properly a railing or other safeguard around a depressed area in a school playground. The court's decision avoided passing upon the question of whether the doctrine of sovereign immunity should be abolished altogether. Instead, the court fashioned a major exception to the traditional rule which distinguished between governmental and proprietary functions and held that the District of Columbia would be immune from liability for torts only where the governmental function involved was of a "discretionary" character–thereby making the District of Columbia liable for torts committed in the performance of "ministerial" functions. The significance of the *Elgin* case here, however, is the further determination that governmental immunity should not be defined solely by the discretionary-ministerial distinction; rather, in each case the court should inquire into the function of the act itself and the reason for governmental immunity. In subsequent cases this refreshing approach has been crystalized such that at the time the instant case was decided by a panel of the United States Court of Appeals for the District of Columbia Circuit, the doctrine had recently been articulated, only a few months earlier, in *Carter v. Carlson,* 447 F.2d at 362:

> . . . in determining whether a particular government function falls within the scope of official immunity, it does not suffice to consider simply whether the officer has 'discretion' in the sense that he exercised his judgment in choosing among alternative courses of action. The proper approach is to consider the precise function at issue and to

determine whether an officer is likely to be unduly inhibited in the performance of that function by a threat of liability for tortious conduct.

Disdaining its own teaching in *Carter*, however, the Court of Appeals in this case (although a different panel of judges) simply concluded that the conduct of the respondents was discretionary in nature. Such a holding was directly in violation of the manner in which claims of official immunity are to be adjudicated. The *Carter* decision distinguished *Barr v. Matteo*, 360 U.S. 564 (1959), and decreed a different approach, although not necessarily a contrary one, for trial courts to employ in examining the discretionary-ministerial question. However, when reviewing petitioners' claims, the majority of the lower court's three-judge panel in this case completely ignored ten years of judicial precedent in the District of Columbia. This curious method of adjudication was the more confounding by the failure of the court's opinion to even acknowledge the existence of the *Elgin-Carter* line of decisions while in at least one other case raising the same issue and decided after *Carter*, a three-judge panel of the same court followed *Carter* as decisionally binding. In *Baker v. Washington*, 448 F.2d 1200 (D.C. Cir. 1971), Judges Fahy, Robinson and Wilkey applied the *Carter* doctrine and reversed the dismissal of Baker's complaint. The District Court had dismissed the complaint under the doctrine of official immunity, stating that the actions complained of were discretionary. As in *Carter*, the Court in *Baker* held that the real test which must be applied is whether the injury resulting from a tortious act can be subjected to judicial redress without thereby jeopardizing the quality and effiency of government itself. No demonstration of such jeopardy has been made in this case, and none can be

made because direct and immediate violations of citizens' constitutional rights cannot be considered governmental functions at all—thereby answering in the negative the question of whether judicial redress here would jeopardize the quality and efficiency of government; it would be improved rather than jeopardized by a declaratory judgment in this case that private, confidential and privileged student records in public schools must be protected from public disclosure. It is not a function of our government to divulge and publish the names of private citizens together with highly embarrassing and scandalous private information derived solely through the legal compulsion of public school attendance. The narrow injunctive relief requested, merely a restraint on further publication or dissemination of petitioners' names and addresses, in no way would interfere with any legitimate interest by Congress or the public in the contents of the documents themselves; rather, it would protect the privacy and anonymity of the petitioners by the mere excision of identifying characteristics in the documents themselves.

The opinion of the Court of Appeals (App. 87, Fn. 23) did not reach the question of injunctive relief, on the basis of the Policy Statement enacted by the School Board on February 17, 1971 (after the fact). Peititioners submit that this Policy Statement (appearing as an appendix to the Court of Appeals Opinion, App. 93-94) lacks any efficacy whatsoever. In no way does it restrain future publication or dissemination of the documents in question by the federal respondents; but more importantly, the policy statement itself is totally defective in that it provides no opportunity whatever to school children or their parents to intervene in any instance where school officials may be requested or tempted to

divulge private student documents and papers. The provision in the Policy Statement of review by the Board of Education or by the Superintendent does not take into account the fundamental interest of students and their parents in the question of disclosing student information.

The courts below also ruled that the complaint must be dismissed on the grounds that it failed to state a claim upon which relief could be granted, and the district court dismissed the complaint as "frivolous", within hours after it was filed.

For the purposes of dismissing a complaint, all well pleaded material allegations of the complaint must be taken to be admitted. *Jenkins v. McKeithen*, 395 U.S. 411 (1965); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). A complaint must be liberally construed in favor of a plaintiff. *Conley v. Gibson*, 355 U.S. 41 (1957). A complaint should not be dismissed unless it appears that plaintiffs could prove no set of facts in support of their claim which would entitle them to relief. *Jenkins, supra*, 395 U.S. at 422.

We submit that the deference to which the allegations of a well pleaded complaint are entitled and general principles of procedural regularity and fairness require a reinstatement of the complaint in this case which was dismissed in a most peculiar and summary fashion, literally on the court's own motion, within hours after the complaint was filed.

CONCLUSION

This Court is respectfully requested to declare the constitutional right of petitioners to be secure in their privacy and to be possessed of the right to invoke the jurisdiction of the federal judiciary in their efforts to obtain a declaration of their rights, injunctive relief and damages; to declare this case to be justiciable and the claims subject to judicial scrutiny; to declare the immunity provided by the Speech or Debate Clause to be unavailable to any of the respondents; and to declare that the doctrine of official immunity was inappropriately applied by the lower courts and that it is not available to any of the respondents because their conduct was not within the scope of their lawful authority.

Respectfully submitted,

URBAN LAW INSTITUTE
JEAN CAMPER CAHN
MICHAEL J. VALDER
G. DAN BOWLING
RONALD G. YELENIK
Suite 509, 1145 - 19th St., N.W.
Washington, D.C. 20036

Counsel for Petitioners

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, et al., *Petitioners,*

v.

JOHN L. McMILLAN, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR DISTRICT OF COLUMBIA RESPONDENTS

C. FRANCIS MURPHY,
Corporation Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D. C.

Attorneys for District of Columbia, Respondents,
District Building,
Washington, D. C. 20004

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BRIEF FOR DISTRICT OF COLUMBIA RESPONDENTS

QUESTIONS PRESENTED

1. Whether the doctrine of official immunity forecloses petitioners' action for damages against the members of the District of Columbia Board of Education and the District of Columbia Superintendent of Schools based upon the failure of such government officials to promulgate regulations governing the confidentiality of school documents and memoranda.

2. Whether the doctrine of official immunity forecloses petitioners' action for damages against a junior high school principal and teacher based upon the release by such officials to a congressional committee of data which the committee, months later, authorized to be printed in a report and disseminated in the public domain.

STATEMENT

In a class action filed in the court below on January 8, 1971, petitioners, as parents of certain pupils at the Jefferson Junior High School in the District of Columbia, sought declaratory and injunctive relief and damages based upon the distribution of a public report containing certain information allegedly violative of their right of privacy. Named as federally affiliated defendants were the Chairman of the District of Columbia Committee of the United States House of Representatives (hereinafter "the Committee"), the Congressmen comprising that Committee, various committee staff members and investigators, the Superintendent of Documents and the Public Printer. The United States was additionally named as a party defendant. Named as District of Columbia affiliated defendants were the members of the Board of Education of the District of Columbia (hereinafter "the Board"), the District of Columbia Superintendent of Schools (hereinafter "the superintendent"), the principal of Jefferson Junior High School (hereinafter "the principal"), and a teacher at that school (hereinafter "the teacher") (App. 1, 4-8).

In their complaint, petitioners alleged that on or about December 16, 1970, the Committee members authorized the publication and distribution of a report entitled "Investigation and Study of the Public School System of the District of Columbia" (House Report No. 91-1681, hereinafter "the report"), and that the report contained certain allegedly derogatory information concerning numerous named students of the Jefferson Junior High School, spe-

cifically, attendance lists, disciplinary letters and memoranda, test papers, and other school documents (App. 8).

Petitioners further alleged that on April 14, 1970, the principal provided a Committee investigator with copies of the disciplinary letters printed in the report and that on May 6, 1970, the teacher provided a Committee investigator with copies of the attendance lists and test papers. Petitioners asserted that such data was in turn forwarded to the Committee and to the Public Printer for incorporation into the report and distribution in the public domain. Neither the Board members nor the superintendent, claimed petitioners, had promulgated rules or regulations governing the confidentiality of these types of school papers (App. 9).

Petitioners went on to allege that the publication of the report caused an adverse impact on their physical and mental health as well as on the health and future careers of their children (App. 10, 11).

Petitioners requested the court (1) to declare that the publication of the matters complained of violated their constitutional, statutory, and other rights, and (2) to enjoin future publication and dissemination of the report as well as disclosure or publication of any attendance records, disciplinary reports, letters, and examination papers mentioning petitioners and their children by name (App. 11, 12). Petitioners further requested the court to compel the Board members to establish rules and regulations regarding the confidentiality of school papers and the right to privacy of students in the schools of the District of Columbia, and to prohibit, *pendente lite*, the members of the Board, the superintendent, the principal and the teacher from disclosing any further information which identifies by name any student of the Jefferson Junior High School and any other students of the District of Columbia public schools. Finally, petitioners requested the court to award them compensatory and punitive damages (App. 12).

Petitioners filed, contemporaneously with their complaint, motions for a temporary restraining order and a preliminary injunction (App. 16-19). Because respondents were not served with process, they filed no answer to the complaint and no oppositions to the motions of petitioners.

On the same day the complaint and petitioners' motions were filed, the case came on before the district court. Counsel for the District of Columbia respondents introduced into evidence a proposed policy statement of the Board respecting the treatment of future congressional inquiries (App. 33, 34, 42, 43). That statement was drafted within the week following publication of the report and recited that:

> "1. The names, addresses and other identifying information related to students are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take all necessary steps to insure that the confidentiality of such privileged information is protected when its release may be demeaning or discrediting to a student or group of students.
>
> "2. The names, addresses and other identifying information related to teachers or any other school personnel are not to be released under any circumstances by school personnel without prior approval by the Superintendent. The Superintendent and the Board of Education shall take every necessary step to protect the confidentiality of such information when there is any reason to believe that its release may be injurious to any individual or group.
>
> "3. The Board of Education and the Superintendent or his designee shall be the only persons authorized to transmit information officially requested by the Congress pertaining to the conduct of school affairs.

"4. The Board of Education and the Superintendent or his designee are the only persons authorized to provide official interpretations of Board of Education policy with regard to the release of information to the Congress." (App. 42-43.)[1]

In the course of the proceedings, the court read into evidence the resolution defining the Committee's investigative powers in connection with the affairs of the District of Columbia Government (App. 36, 37). Counsel for petitioners hastened to state that he did not claim that the Committee acted pursuant to an invalid legislative purpose in investigating the District of Columbia public school system, specifically noting that he did not challenge the actions of investigators in seeking information from the principal and the teacher (App. 35-37). In this regard, counsel for petitioners represented to the court that:

"* * * They may investigate, they may go into the schools and talk to people, perfectly legitimate. We don't question it; it would be fruitless and facetious of us to do that. However, once they have done that we submit they just simply cannot reproduce deflamatory [sic], inflamatory, confidential materials. Letters for instance, from a principal to a parent, saying Mrs. Smith, your daughter today broke a window. No one has adjudicated whether it is true or not. It doesn't really matter whether it is true or not, it is just simply a private matter.

* * * *

"* * * That resolution indicates the Committee can investigate, can subpoena documents, it can

[1] A similar policy statement judicially noticed by the court of appeals was adopted by the Board on February 17, 1971 (App. 87, 93-94).

compel witnesses, it can go around to the schools as it did. We have no quibble with that * * * ." (App. 36-37.)

At the conclusion of the hearing, the district court denied petitioners' motion for a temporary restraining order and dismissed the complaint (App. 40-41), and on January 11, 1971, the court filed a written opinion in support of its ruling (App. 48-50).

On March 11, 1971, the court of appeals affirmed the district court's ruling, and on March 18, 1972, petitioners filed in this Court a petition for a writ of certiorari. The Court granted certiorari on June 26, 1972.

SUMMARY OF ARGUMENT

The liability of the District of Columbia respondents is foreclosed by the doctrine of official immunity under this Court's holdings in *Barr* v. *Matteo*, 360 U. S. 564 (1959), and related decisions. In seeking to compel the members of the Board and the superintendent to respond in damages because of their failure to promulgate regulations governing the confidentiality of documents, petitioners challenge top level discretionary action which has always been protected by that doctrine.

The actions of the principal and teacher in releasing data to the Committee are similarly protected by the official immunity doctrine, since under *Barr* v. *Matteo* that doctrine does not cease to be applicable simply because public officers perform at an intermediate level rather than at a policy-making level. In determining what data to release intergovernmentally to the Committee these officers were clearly performing a discretionary function within the outer perimeter of their official duties and were accordingly immune from liability.

That immunity is not altered by the Civil Rights Act of 1871, because in providing information to the congressional

investigators in furtherance of the Committee's duly authorized investigative purpose, and the constitutional authority of Congress to legislate for the District of Columbia, the principal and teacher acted under color of federal law rather than under color of state law. In any event, it is axiomatic that public officers do not lose their immunity, even in cases arising under the Civil Rights Act of 1871, when they act in good faith, and it is clear from the record that both the principal and the teacher acted in good faith in furnishing the Committee with the requested data.

ARGUMENT

Petitioners' action for damages against the District of Columbia respondents was correctly held foreclosed by the doctrine of official immunity.

In essence, petitioners claim that the Board members and the superintendent may be compelled to respond in damages because of their past failure, in the exercise of their top level supervisory discretion, to promulgate regulations governing the confidentiality of school documents and memoranda.[2] Petitioners also claim that since the principal and the teacher engaged in the actual release to congressional investigators of the information subsequently printed in the report, they too are amenable to liability. The court of appeals concluded that petitioners' claims against all District of Columbia respondents were foreclosed by the doctrine of official immunity, as that doctrine has been recognized and applied by this Court (App. 86-91). In chal-

[2] In effect, the Board did just that in a revised "Policy Statement Regarding Confidential Inquiries" adopted on February 17, 1971 (App. 93-94). In light of this intervening development the court of appeals ruled, consistent with principles articulated by this Court, that there was "no substantial threat of continuing injury," and hence no basis for the issuance of an injunction against the District of Columbia respondents (App. 87). Petitioners did not challenge the injunctive relief aspect of the Court's ruling in their certiorari petition and manifestly should not be permitted to do so now.

lenging that ruling, petitioners make no attempt to elaborate on the manner in which this Court has previously interpreted and applied the official immunity doctrine, but place great emphasis on a series of decisions of the United States Court of Appeals for the District of Columbia Circuit (Brief at 54). These decisions, however, were not generally concerned with the official immunity doctrine, but dealt with the question of the application of the doctrine of *sovereign immunity* to the District of Columbia as a governmental entity, in the absence of a showing of a top level discretionary judgment involving the formulation of policy. Nonetheless, petitioners urge on the basis of such decisions that the doctrine of official immunity may be invoked only if it can be demonstrated in each case that in the absence of its invocation "the quality and efficiency of government itself" will be jeopardized (Brief at 56). It is the position of the District of Columbia respondents that petitioners have misconceived the nature of the official immunity doctrine and that the court of appeals acted in conformity with principles articulated by this Court in applying that doctrine in the instant case.

In *Barr* v. *Matteo,* 360 U. S. 564 (1959), this Court declared the policy underlying the official immunity doctrine as one designed to encourage government officers to perform their duties vigorously and free from intimidation by the threat of damage suits. That case involved an action for libel based upon a press release issued by the Acting Director of the Office of Rent Stabilization. *Howard* v. *Lyons,* 360 U. S. 593 (1959), a companion case, involved a suit for defamation predicated on a statement issued by the Commander of the Boston Naval Shipyard. The Court held that both the Government employees were absolutely privileged against liability for damages, because the actions complained of had been performed within the scope of their official duties. The Court noted that as long as the action taken by the officer involved "was within the outer perim-

eter of * * * [his] line of duty" the immunity privilege must be recognized. That privilege, the Court added, was applicable despite allegations of malice. 360 U. S. at 575.

In reviewing the history of the federal law of privilege as a defense by Government officers "to civil damage suits for defamation and kindred torts" (360 U. S. at 569), the Court pointed out that, while Congress (by constitutional provision) and judicial officers (by court decision) early had an absolute privilege in the exercise of their official functions, the privilege had also been applied in *Spalding* v. *Vilas,* 161 U. S. 483 (1896), to protect officials in the executive branch. Concluding that the balance between the public and private interests involved should be struck in favor of the former, the Court described the basic justification for the grant of immunity as follows (360 U. S. at 571):

> "* * * It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties —suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. * * *"

The Court quoted extensively from Judge Learned Hand's opinion in *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2nd Cir., 1949), which, it noted, had admirably expressed the reasons underlying the privilege:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good,

should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. * * *"

The Board members and the superintendent, much like the officials involved in *Barr* and *Howard*, are upper echelon employees entrusted with policy making functions. The principles articulated by this Court in those cases unquestionably compel the conclusion that neither the Board members nor the superintendent may be compelled to respond in damages for failing to promulgate regulations in the exercise of such top level functions.

A like privilege was properly granted to both the principal and the teacher. The rationale of *Barr* and *Howard* by no means ceases to be applicable simply because the employees involved perform at an intermediate level rather than a policy making level. In concluding that the privilege protects lesser government employees the Court in *Barr* went on to emphasize (360 U. S. at 572-574) that:

> "* * * The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.
>
> "* * * It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' *Spalding* v. *Vilas, supra,* at 498—which must provide the guide in delineating the scope of the rule * * * ."

As the Court recognized, since the privilege is "an expression of a policy designed to aid in the effective functioning of government," the only difference in its application to actions of high ranking executive officers and to those of an officer of lower rank lies in the broader range of the functions and responsibilities and the wider scope for the exercise of discretion in the case of the former.

The lower federal courts—both before and since *Barr*—have consistently held the privilege applicable to lower ranking government employees. See e.g., *Newbury* v. *Love,*

242 F. 2d 372 (D. C. Cir., 1957) (suit for defamation against a Government personnel officer); *Papagianakis* v. *The Samos,* 186 F. 2d 257 (4th Cir., 1950) (suit against immigration officials seeking damages on the ground of false imprisonment); *Sauber* v. *Gliedman,* 283 F. 2d 941 (7th Cir., 1960) (action for malicious defamation against a Special Assistant to the Attorney General); *Cooper* v. *O'Connor, et al.,* 99 F. 2d 135 (D. C. Cir., 1938) (Comptroller of Currency and deputies, receiver of bank, attorney for government, special agent of F. B. I., sued for malicious prosecution); *Bershad* v. *Wood,* 290 F. 2d 714 (9th Cir., 1961), *David* v. *Cohen,* 407 F. 2d 1268 (D. C. Cir., 1969), and *Sowders* v. *Damron,* 457 F. 2d 1182 (10th Cir., 1972) (actions for damages against Internal Revenue officers); *Hughes* v. *Johnson,* 305 F. 2d 67 (9th Cir., 1962) (suit for trespass against federal game wardens); *Taylor* v. *Glotfelty,* 201 F. 2d 51 (6th Cir., 1952) (libel action based on report of federally employed psychiatrist); *Scherer* v. *Brennan,* 379 F. 2d 609 (7th Cir., 1967) (treasury agents assigned to protect the President sued for trespass and unlawful interference with plaintiff's right of access to his place of business); *Skolnick* v. *Campbell,* 398 F. 2d 23 (7th Cir., 1968) (action for assault and battery against court crier and bailiff); *Gordon* v. *Adcock,* 441 F. 2d 261 (9th Cir., 1971) (action for libel based on evaluation report submitted to Civil Service Commission by former superior officer of applicant for federal employment). See also *Norton* v. *McShane,* 332 F. 2d 855, 859-860, n. 5 (5th Cir., 1964); *Developments in the Law—Remedies Against the United States and its Officials,* 70 Harv. L. Rev. 827, 835 (1957).

The actions of the principal and the teacher plainly fell within the outer perimeter of their official duties. These officers were dealing with information garnered by them in the course of such duties when called upon to decide whether to cooperate in connection with the investigation of a con-

gressional committee. In the district court petitioners did not claim that the Committee lacked authority to request information from these officials, or that such officials were unjustified in providing data of the kind requested to investigators acting pursuant to congressional resolution (App. 35-37). Indeed, as the Court pointed out in *Watkins* v. *United States,* 354 U. S. 178, 187 (1957), "[i]t is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. * * * "

In addition, the actions of the principal and the teacher were plainly discretionary actions. Petitioners do not dispute the notion that, as officers affiliated with the District of Columbia public school system, it was the obligation of the principal and the teacher to use judgment in determining the extent to which they would cooperate with the Committee's investigators and what information they would provide. The policy declared by this Court in *Barr* v. *Matteo* —one designed to encourage government officers to perform their duties vigorously and free from intimidation by the threat of damage suits—fully justified the ruling of the court of appeals that they were immune from liability based upon the discharge of that obligation.

It warrants emphasis that, unlike in *Barr* v. *Matteo,* the data with which this case is concerned was not publicly disseminated by the principal and the teacher. Nor was it released by these officials in anticipation of its public dissemination months later. Quite to the contrary, counsel for petitioners in effect conceded in the district court that the principal and the teacher acted in good faith in releasing such data to congressional investigators (App. 35-37). To be sure, cooperation with duly authorized Committee investigations cannot be equated with ultimate conspiratorial participation in the actions of the Public Printer. From the standpoint of the District of Columbia respondents, therefore, this case involves information provided in good faith

by subordinate government officials to duly authorized representatives of a Committee of the Congress of the United States in furtherance of the concededly valid purpose set forth in the resolution by which the Committee was organized (App. 36-37). As such it involves nothing more than the circulation of an internal report within the confines of the government itself. Internal disseminations of this kind have traditionally enjoyed the protection of absolute privilege. See *Barr* v. *Matteo,* dissenting opinion of Chief Justice Warren, 360 U. S. at 582, citing *Farr* v. *Valentine,* 38 App. D. C. 413 (1912). See also *Frommhagen* v. *Glazer,* 442 F. 2d 338, 340 (9th Cir., 1971); Annot. 26 A. L. R. 3rd 492, 510-515. In short, the *Barr* rationale has *a fortiori* applicability to the actions of the District of Columbia respondents in the case at hand.

Conformably with the views expressed by the dissenting judge in the court of appeals (App. 112), petitioners, however, urge that the common law immunity of the District of Columbia respondents has been narrowed by the Civil Rights Act of 1871, 42 U. S. C. § 1983. While that enactment is concerned with actions taken under color of state law, it does not reach actions taken under color of federal law. See *Wheeldin* v. *Wheeler,* 373 U. S. 647, 650 (1963). The congressional investigators who obtained the information from the principal and teacher are unquestionably entitled to the protection of common law official immunity unmodified by the Civil Rights Act of 1871, since they clearly were acting under color of federal law in furtherance of the policy set forth in the Committee's resolution (App. 36-37). That being so, it would be both inconsistent and inequitable to apply one immunity standard to the investigators as the receivers of the information, yet a different and narrower standard to the principal and teacher as the providers of the information. The more logical conclusion, we submit, is that the provision and receipt of the information constituted interrelated actions in furtherance

of the Committee's duly authorized investigative purpose (App. 36-37) and the constitutional authority of Congress to legislate for the District of Columbia, and thus clearly are not actions taken under color of *state* law within the purview of 42 U. S. C. § 1983.

Even if it be assumed that § 1983 is applicable to the District of Columbia respondents, it by no means follows under the circumstances of this case that § 1983 should restrict their immunity. As this Court made plain in *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967), "the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities" when it enacted § 1983. It is true, of course, that federal courts, while recognizing the limits of official immunity in the context of the Civil Rights Act as far from certain, have given that doctrine a more restrictive application in federal civil rights cases involving defendants other than legislative and judicial officers. See, for example, *Dale* v. *Hahn*, 440 F. 2d 633, 636-637 (2nd Cir., 1971). However, these courts, consistent with pronouncements of this Court in *Pierson* (id. at 555-557), have not hesitated to permit invocation of the official immunity doctrine in actions arising under § 1983, when it was clear from the record that the officers involved acted in good faith. See *Franklin* v. *Meredith*, 386 F. 2d 958, 960-961 (10th Cir., 1967); *McLaughlin* v. *Tilendis*, 398 F. 2d 287, 290 (7th Cir., 1968); *Kirstein* v. *Rector and Visitors of University of Virginia*, 309 F. Supp. 184, 189 (E. D. Va., 1970) (three-judge court).

As previously pointed out, counsel for petitioners made plain in the district court that he had "no quibble" concerning the good faith of the principal and the teacher in providing information to the Committee, but complained essentially of the ultimate publication and dissemination of that information months later (App. 36-37, 44, cf. App. 9). Because the District of Columbia respondents admittedly were not privy to such publication and dissemination,

that activity had no bearing on their good faith. Accordingly, their immunity remained intact notwithstanding the Civil Rights Act of 1871.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court of appeals as to the District of Columbia respondents should be affirmed.

C. FRANCIS MURPHY,
Corporation Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D. C.

Attorneys for District of Columbia, Respondents,
District Building,
Washington, D. C. 20004

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6356

JOHN DOE, BY HIS GUARDIAN, MARY DOE, AND RICHARD ROE, BY HIS GUARDIAN, MARY ROE, PETITIONERS

v.

JOHN L. McMILLAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE LEGISLATIVE RESPONDENTS[1]

OPINIONS BELOW

The oral opinion of the district court (A. 38–41) and its order dismissing the complaint (A. 48–50) are not reported. The majority and dissenting opinions in the court of appeals (A. 67–113) are reported at 459 F.2d 1304. Majority and dissenting opinions in

[1] This brief is filed on behalf of the following respondents: Nineteen Members of Congress who were the Chairman and some of the Members of the Committee on the District of Columbia of the House of Representatives in the 91st Congress, the clerk, the staff director, counsel, a consultant and an investigator of the Committee, the Public Printer and the Superintendent of Documents of the Government Printing Office.

the court of appeals on petitioners' application for continuation of an earlier injunction pending appeal (A. 57–64) are reported at 442 F.2d 879.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1972 (A. 115). The petition for a writ of certiorari was filed on March 18, 1972, and granted on June 26, 1972 (A. 117). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the Constitution and the official immunity doctrine preclude claims for declaratory relief, injunction and damages against Members, employees and agents of the United States House of Representatives based upon a valid legislative act, i.e., the publication of a duly authorized Committee report which was printed by the House.

2. Whether a report of a Committee of Congress can constitute a Bill of Attainder.

3. Whether the Separation of Powers Doctrine precludes the judiciary from interfering with legislative prerogatives such as are presented here.

CONSTITUTIONAL PROVISIONS, STATUTES AND HOUSE RESOLUTION INVOLVED

Constitution:

Article I, Section 1:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article I, Section 6:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

Article I, Section 8:

> The Congress shall have Power * * *
>
> * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States,* * *
>
> * * * * *
>
> No Bill of Attainder or ex post facto Law shall be passed.

Statutes:

Title 44, U.S.C.:

> § 301. The President of the United States shall nominate and, by and with the advice and consent of the Senate, appoint a suitable person, who must be a practical printer and versed in the art of bookbinding, to take charge of and manage the Government Printing Office. His title shall be Public Printer. He shall give bond approved by the Secretary of the Treasury

in the sum of $25,000 for the faithful performance of the duties of his office.

§ 501. All printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office, * * *

§ 701. (a) The order by either House of Congress to print a document or report shall signify the "usual number" of copies for binding and distribution among those entitled to receive them * * *

(b) The "usual number" of documents and reports shall be one thousand six hundred and eighty-two copies, which shall be printed at one time and distributed as follows:

Of the House documents and reports, unbound—to the Senate document room, one hundred and fifty copies; to the office of the Secretary of the Senate, ten copies; to the House document room, not to exceed five hundred copies; to the office of the Clerk of the House of Representatives, twenty copies; to the Library of Congress, ten copies, as provided by section 1718 of this title.

* * * * *

§ 1702. The Public Printer shall appoint a competent person to act as Superintendent of Documents who shall be under the control of the Public Printer.

* * * * *

> The Superintendent of Documents * * * shall have general supervision of the distribution of all public documents, and to his custody shall be committed all documents subject to distribution, excepting those printed for the special official use of the executive departments, which shall be delivered to the departments, and those printed for the use of the two Houses of Congress, which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service and distributed or delivered ready for distribution to Members upon their order by the Superintendents of the Senate Service Department and House Publications Distribution Service, respectively.

House Resolution 76, 91st Cong., 1st Sess., February 5, 1969, 115 Cong. Rec. 2784:

> *Resolved,* That the Committee on the District of Columbia, acting as a whole or by subcommittee, is authorized to conduct a full and complete investigation and study of the following:
>
> (1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia;
>
> (2) the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia; * * *
>
> For the purpose of carrying out this resolution the committee or subcommittee is authorized to sit and act during the present Congress

at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary; except that neither the committee nor any subcommittee thereof may sit while the House is meeting unless special leave to sit shall have been obtained from the House. Subpenas may be issued under the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member.

The committee shall report to the House as soon as practicable during the present Congress the results of its investigation and study together with such recommendations as it deems advisable. Any such report which is made when the House is not in session shall be filed with the Clerk of the House.

* * * * *

STATEMENT

Petitioners seek declaratory and injunctive relief against further publication and distribution of a congressional document, a report of a Committee of the House of Representatives, and sue for both punitive and compensatory damages for alleged violations of their "statutory, regulatory, administrative, common law, and constitutional rights" (A. 5).

The report in question (H. Rep. No. 91-1681, 91st Cong., 2d Sess. (1970)) is a study of the District of

Columbia public school system, conducted on behalf of the Committee on the District of Columbia of the House by a Special Select Subcommittee under the authority of H. Res. 76, 91st Cong., 1st Sess. (1969) (*supra*, p. 5).

In the opening pages of the report (pp. 1–6) the Committee makes thirty-six specific findings, resulting from more than seven months of investigation and study and fourteen hearings at which members of the School Board and other school and city officials testified.

Included within the 450 page report, as a small part of the supporting data for the Committee's findings, are copies of absence sheets, lists of "class cutters", copies of certain test papers and copies of various documents relating to several students who presented disciplinary problems at one school (pp. 212–253, 256–258). The report states that these were "printed to give a realistic view of . . . [a] troubled school and the lack of administrative efforts to rectify the multitudinous problems there" (p. 212); to show the poor reading ability of seventh graders given a fifth grade history test (p. 223); to outline the conduct of a student which did not result in suspension (p. 253); and to illustrate "suspension problems" (pp. 256–258). These documents were given to an investigator for the Committee by employees of the District of Columbia School System (*infra*, pp. 38–39) in the course of his activities as a committee aide. These inclusions in the report are the gravaman of petitioners' complaint against the legislative respondents on whose behalf this brief is filed.

The Committee report was transmitted to the House by the Chairman of the Committee (A. 47), was referred to the Calendar of the Committee of the Whole House on the State of the Union and was ordered to be printed. (A. 44; 116 Cong. Rec. H11347). Thereafter the report was printed and distributed by the Government Printing Office in accordance with the provisions of 44 U.S.C. 501 and 701.[2]

Additional details are stated in the course of the Argument.

SUMMARY OF ARGUMENT

I

The majority and dissenting opinions in *Gravel v. United States,* 408 U.S. —— (1972),[3] coalesce as a unanimous holding that the legislative respondents are immune from "question[ing] in any other Place" for or on account of the matters of which petitioners complain.

Petitioners' complaint is a suit upon a report issued by the House Committee on the District of Columbia pursuant to the House's authorization to conduct "a

[2] In footnote 3 on page 11 of petitioners' brief, it is noted that one copy of 48 pages of the report was submitted in a sealed envelope, together with a letter to the Clerk of the Court requesting that it be made available for inspection only by court personnel. Because of this partial submission and due to the fact that legislative respondents have found it necessary to refer to other parts of the report, we are submitting nine (9) complete copies of H. Rep. No. 91-1681 to the Clerk for the use of the Court and its personnel.

[3] The official report of these opinions and the opinions in the companion case of *United States* v. *Brewster*, 408 U.S. —— (1972), had not been printed when this brief was filed. References throughout this brief are to the Slip Opinions.

full and complete investigation and study of . . . the organization, management, operation, and administration of any independent agency or instrumentality of government . . . in the District of Columbia". The report was ordered to be published pursuant to the rules of the House. There can be no question that the Speech or Debate Clause extends to all parts of the report and to all aspects of the Committee's legislative activities in the investigation, compilation and publication of the report. ". . . Committee reports, resolutions, and the act of voting are equally covered" by the Clause. *Gravel* v. *United States,* Slip Op. 11. Accord, Douglas, J., dissenting, Slip Op. 3; Brennan, J., dissenting, Slip Op. 2–3; *United States* v. *Brewster,* Slip Op. 8, 11–12, 24; Brennan, J., dissenting, Slip Op. 4. Specifically, the inclusions in the report which are the gravamen of petitioners' complaint are protected. The "introduction of documents or other exhibits in the record the committee or subcommittee is making" is a legislative act within the coverage of the Clause. *Gravel,* Douglas, J., dissenting, Slip Op. 3.

Just as the Member-respondents are immune under the Speech or Debate Clause, so also are the aide-respondents under the unanimous holding in *Gravel* (Slip Op. 9–10; Douglas, J., dissenting, Slip Op. 5; Brennan, J., dissenting, Slip Op. 1), including respondent Martin, the investigator of the Committee who obtained the school records included in the report of which petitioners complain.

Respondents Public Printer and Superintendent of Documents are also within the protection of the clause. That the printing of bills, reports, debates,

hearings, etc., is an absolutely essential part of the legislative process has not been seriously disputed. The Government Printing Office is a part of the legislative branch of the Government; the Public Printer was once officially titled the "Congressional Printer";[4] and the rules of the House and Senate require printing as a condition precedent to further legislative action in most cases.[5] The Congress is required by statute[6] to have its printing done at the Government Printing Office and the man charged by law with the duty to "take charge of and manage the Government Printing Office" is required to be appointed by the President by and with the advice and consent of the Senate. During fiscal year 1970, more than 41 million publications were printed for the Congress.[7]

The particular report involved in this case was printed and distributed pursuant to the rules of the House. Legislative documents so printed and distributed are in no sense publications of the Government Printing Office; they are the publications of the Senate or House or Congress as a whole and the

[4] See Act of February 22, 1867, Section 3758 of the Revised Statutes of June 22, 1874.

[5] See for example clause 2 of Rule XVIII (section 821) of the Rules of the House of Representatives (page 457 of House Document No. 439, 91st Congress, 2d Session) which provides in part:

"* * * and all bills, petitions, memorials, or resolutions reported from a committee shall be accompanied by reports in writing, which shall be printed."

[6] 44 U.S.C. 501, supra, p. 4.

[7] See Table 11 of the Annual Report of the Public Printer for fiscal year 1970.

printing and distribution of such a document are as much legislative acts as are the legislative activities involved in the compilation of the document itself. In the performance of his functions of printing and distributing such documents, the Public Printer (and the Superintendent of Documents insofar as he participates in such activities) is as much the "alter ego" (*Gravel,* Slip Op. 10) or "surrogate" (*id.,* Douglas, J., dissenting, Slip Op. 5) of the legislative body as are the other aides who assist the legislators in their legislative tasks. In addition, these two officials are within the protection of the official immunity as applied in *Barr* v. *Matteo,* 360 U.S. 564 (1959), and *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963).

II

Petitioners' attempts to avoid the unanimous holding in *Gravel* as to the immunity of the legislative activities involved here are unavailing. The gravamen of their complaint is that the publication in the report of the names of their children violated their and their children's rights of privacy. The familiar cases under the First, Fourth, Fifth and Fourteenth Amendments which they invoke do not support their claims of violation of their rights and those cases are inapposite in any event because they did not involve the Speech or Debate Clause.

Petitioners also invoke the *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Powell* v. *McCormack,* 395 U.S. 486 (1969), line of cases and the Court's characterization of those cases in *Gravel* as creating an exception

from the Speech or Debate Clause for "illegal or unconstitutional conduct" (Slip Op. 13) as support for their attempt to pierce the privilege. The answer to this is first, there was no illegal or unconstitutional conduct and, secondly, that we are here concerned with a committee report. The protection of the Speech or Debate Clause applies absolutely to such a document and all the other legislative activities associated with it. From beginning to end—from the House's authorization of the Committee's investigation and study to the printing and publication of the report—the activities connected with the report were covered by the Clause as ". . . 'things generally done in a session of the House . . . in relation to the business before it.'" *Gravel,* Slip Op. 11.

Even so, petitioners contend that the bar of the Speech or Debate Clause does not apply here. Their case comes down to this: there was an alleged unconstitutional invasion of the right of privacy in the means whereby the Committee obtained the school records included in the report about which they complain; that alleged unconstitutional action tainted the report itself; ergo, they are entitled to sue the Members and their aides on the report. Again, the answer is that the report is absolutely privileged, regardless of what it contains. And the privilege extends to the Members and their aides who participated and assisted in the legislative activities of conducting the investigation and hearings, introducing documents and exhibits into the record, and compiling and publishing the report on the basis of the record so made.

Moreover, there was, on petitioners' own allegations, no violation of their rights in the Committee's obtention of the school records. Petitioners had no proprietary or possessory interest in them. They were records of the school system. All that petitioners alleged was that employees of the system "gave" the records to respondent Martin, the Committee's investigator. There is not in these allegations the slightest resemblance to *Dombrowski* v. *Eastland, supra,* which is the basis of petitioners' claim of a cause of action against Martin. Petitioners cannot remake their case here to fit the *Eastland* exception from the Speech or Debate Clause by their gratuitous assertions that Martin "surreptitiously" "seized petitioners' private school records". As an aide of the Committee, respondent Martin stands in the same protected position as a Member, had the Member performed the legislative act of receiving the records for the purposes of the Committee's investigation.

III

Petitioners' contention that the report constitutes a bill of attainder is frivolous. By definition, a bill of attainder is a " 'special statute * * * by which a man [is] pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment per legem terrae' ". *United States* v. *Lovett,* 328 U.S. 303, 322 (1946), Frankfurter, J., concurring. Petitioners' attempt to equate the Committee report in question to an enacted law, the only form of legislative action which can constitute a bill of attainder, is contrary to reason and authority.

IV

Since Article I, Section 1 of the Constitution vests all legislative power of the United States in the Congress, judicial inquiry into Congressional motives, and judicial censorship of Committee reports are violative of the Separation of Powers Doctrine.

This Court, in *O'Donoghue* v. *United States,* 289 U.S. 516 (1933) at 530, recognized the importance of this Doctrine when it found unconstitutional a congressional attempt to reduce judicial salaries. And, in *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (1956), a three-judge Court, on facts similar to those presented here, found no authority to prevent Congress from publishing a document, pointing out that the inclusion of erroneous or defamatory matter is solely within the discretion of Congress.

ARGUMENT

I

GRAVEL V. UNITED STATES STANDS AS A UNANIMOUS HOLDING THAT THE SPEECH OR DEBATE CLAUSE AFFORDS ABSOLUTE IMMUNITY TO THE LEGISLATIVE RESPONDENTS IN THIS CASE

The majority and dissenting opinions in *Gravel* v. *United States* and the companion case of *United States* v. *Brewster* contain an exhaustive review of the history, purpose and application of the Speech or Debate Clause. In totality, they constitute a veritable encyclopedia of the learning and law on the subject. There is no need to go beyond those opinions in the search for the correct answers to the questions in-

volved in this case concerning the immunity of the legislative respondents under the Clause. It is our position that the majority and dissenting views in *Gravel* coalesce as a unanimous holding that these respondents are immune from "question[ing] in any other Place" for or on account of the matters of which petitioners complain.

A. *The Challenged Report.* "The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia. Constitution, Art. I, § 8. This legislative power encompasses a broad investigating authority. "The scope of the power of inquiry * * * is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1959).

The Committee on the District of Columbia is a standing committee of the House of Representatives. It was authorized by House Resolution 76 (supra, p. 5) to "conduct a full and complete investigation and study of . . . (1) the organization, management, operation, and administration of any department or agency of the government of the District of Columbia . . . [and] (2) . . . of any independent agency or instrumentality of government operating solely in the District of Columbia . . ." (A. 45). House Resolution 76 also directed the Committee to report to the House "during the present Congress the results of its investigation and study together with such recommendations as it deems advisable." (*supra,* p. 6). Pursuant to this authorization and direction, a Special Select Subcommittee of the Committee on the Dis-

trict of Columbia conducted an exhaustive investigation, including hearings, of the public school system of the District. On December 8, 1970, the Chairman of the Committee transmitted to the Speaker of the House of Representatives "an interim report of the Committee on the District of Columbia . . . based upon the hearings and investigation of the" subcommittee (A. 47). Thereafter this 450 page report was in turn "Committed to the Committee of the Whole House on the State of the Union and ordered to be printed" (A. 44; 116 Cong. Rec. H11347). The report, entitled "Investigation and Study of the Public School System of the District of Columbia", was printed and distributed by the Government Printing Office as House Report No. 91–1681, 91st Cong., 2d Sess. Under the heading "Solutions" (pp. 448–449) the Committee listed 27 recommendations of statutory and administrative remedial measures to correct what it characterized as a school system "floundering in its own incompetence" (p. 450). For example, the Committee stated that laws should be enacted "making parents responsible for their children's acts of vandalism" and requiring "teachers to return to summer school, travel in their free time or do other acts of continuing education, in an effort to stay abreast of new ideas and teaching techniques" (p. 448). It is apparent that many of the Committee's recommendations would affect appropriations for the school system. Among its "Conclusions" (p. 450), the Committee

> urged that laws be enacted immediately to curb the abuse of the waste of Federally appropriated funds; that an audit of the District of Columbia Public School System by the General Accounting Office be requested for the years 1968–69 and 1969–70; that it be required by law that one or more metropolitan police be stationed at school buildings on a 24 hour basis where the need dictates and that the D.C. Metropolitan Police Department enforce the narcotics laws now available to it on a city-wide basis in general, and as to the Public Schools in particular.

There can be no question that the Speech or Debate Clause covers this House report.

> . . . The clause . . . speaks only of "Speech or Debate", but the Court's consistent approach has been that to confine the protection of the Speech or Debate Clause to words spoken in debate would be an unacceptably narrow view. *Committee reports,* resolutions, and the act of voting are equally covered; "[i]n short . . . things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881), quoted with approval in *United States* v. *Johnson,* 383 U.S. 169, 179 (1966).... [Emphasis added.][8]

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[8] *Gravel* v. *United States*, Slip Op. 11. Accord, Douglas, J., dissenting, Slip Op. 3; Brennan, J., with whom Douglas and Marshall, JJ., joined, dissenting, Slip Op. 2–3. See also *United States* v. *Brewster*, Slip Op. 8, 11–12, 24; Brennan, J., dissenting, Slip Op. 4.

This broad immunity extends, of course, to any and all proceedings, civil or criminal, outside the halls of Congress. *Gravel* v. *United States,* Slip Op. 9; Douglas, J., dissenting, Slip Op. 3–4; *United States* v. *Brewster,* Slip Op. 14; Brennan, J., dissenting, Slip Op. 6; White, J., dissenting, Slip Op. 3.

The Speech or Debate Clause's protection of the report in question extends to all its parts and to all aspects of the Committee's legislative activities in the investigation, compilation and publication of the report. All such matters were "things generally done in a session of the House". *Gravel* v. *United States,* Slip Op. 11. The investigation and hearings, the gathering of data from sources within the school system of the District of Columbia, the compilation of the report, its submission to the Speaker and commitment to the Whole House on the State of the Union, the Rules of the House that ordered it to be printed, and the printing and distribution of the report by the Government Printing Office were all legitimate legislative activities of the clearest kind.

The particular portions of the report of which petitioners complain consist of records the Committee cited as supporting its findings. The complaint describes these records as "(1) copies of attendance records of Jefferson Junior High School for several days during 1970 (pages 213 to 223) . . . includ[ing] the names of numerous students . . . whose parents are plaintiffs herein; (2) various test papers carrying the names and grades of students at the Jefferson Junior High School whose parents are plaintiffs herein (pages 224 to 252); and (3) various letters and

memoranda regarding alleged disciplinary problems of students at the Jefferson Junior High School, whose parents are plaintiffs herein (pages 256 to 258)" (A. 8). It was alleged "[u]pon information and belief" that respondent "Savoid [the Principal of Jefferson Junior High School] gave [respondent] Martin [an investigator of the Committee] copies of the disciplinary letters printed in the report and other materials and . . . [that respondent] Irven [a teacher at Jefferson Junior High School] gave . . . Martin copies of the attendance lists, the school test papers . . . and other materials"; that Savoid and Irven "were not authorized to release these documents"; and that Martin "delivered" copies of the described materials to respondent "Little, who, as a contract consultant to the Committee, was responsible for the preparation of the report . . . [and who] caused the copies of the papers referred to above to be included in a draft of the report [which respondent] members of the United States House of Representatives approved . . . for publication" (A. 9).

These very allegations defeat petitioners' contention that the portions of the report of which they complain are not immunized against their suit by the Speech or Debate Clause. The Court noted in *Gravel* (Slip Op. 18) that

> The heart of the clause is speech or debate in either House, and insofar as the clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings

with respect to matters which the Constitution places within the jurisdiction of either House.

Nothing contributes more to the "communicative processes" of the House than committee reports. And as Mr. Justice Douglas pointed out in his dissenting opinion in *Gravel* (Slip Op. 3–4):

> One of the things normally done by a member "in relation to the business before it" is the introduction of documents or other exhibits in the record the committee or subcommittee is making. The introduction of a document into a record of the Committee or subcommittee by its Chairman certainly puts it in the public domain. Whether a particular document is relevant to the inquiry of the committee may be questioned by the Senate in the exercise of its power to prescribe rules for the governance and discipline of wayward members. But there is only one instance, as I see it, where supervisory power over that issue is vested in the courts, and that is where a witness before a committee is prosecuted for contempt and he makes the defense that the question he refused to answer was not germane to the legislative inquiry or within its permissible range. See *Uphaus* v. *Wyman,* 360 U.S. 72; *Kilbourn* v. *Thompson, supra,* at 190.
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> In all other situations, however, the judiciary's view of the motives or germaneness of a Senator's conduct before a committee is irrelevant. For, "[t]he claim of an unworthy purpose does not destroy the privilege." *Tenney* v. *Brandhove* 341 U.S. 367, 377. If there is an

> abuse, there is a remedy; but it is legislative, not judicial.[9]

See also Brennan, J., dissenting in *Gravel* (Slip Op. 15): "The receipt of materials for use in a congressional hearing is an integral part of the preparation for that legislative act."

In another aspect, the report in all respects falls within the sphere of protected legislative activity. The very title of the report—Investigation and Study of the Public School System of the District of Columbia—implies that one of the purposes of the Committee (and of the House itself in its broad grant of authority in H. Res. 76, *supra,* p. 5) was to inform the Congress and the public of conditions in the system.

> . . . That this "informing function" falls into the class of things "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourn* v. *Thompson,* 103 U.S. 168, 204 (1881), was explicitly acknowledged by the Court in *Watkins* v. *United States,* 354 U.S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or

[9] Petitioners cite *United States* v. *Rumely*, 345 U.S. 41 (1953), *Watkins* v. *United States*, 354 U.S. 178 (1957), and *Barenblatt* v. *United States*, 360 U.S. 109 (1959) (Br. 32, 34–35, 40–41) in support of their contention that the Speech or Debate Clause does not foreclose judicial oversight here. These cases are wide of the mark. They were prosecutions for contempt, the "only . . . instance," as Mr. Justice Douglas pointed out, supra, p. 20, in which the Clause does not foreclose judicial review of the proceedings of a committee of Congress.

> inefficiency in the agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.,* at 200, n. 33. Brennan, J., dissenting in *Gravel,* Slip Op. 2–3.

There was no disagreement in *Gravel* as to the Speech or Debate Clause's coverage of a committee report or, specifically, as to matters such as those of which petitioners here complain. "Committee Reports, resolutions and the act of voting are equally covered [by the Clause] . . ." (Slip Op. 11). The "introduction of documents or other exhibits in the record the committee or subcommittee is making" (Douglas, J., *supra*) and the publication of the report by the House in the exercise of the informing function (Brennan, J., *supra*), as well as the purely legislative function (see the Committee's recommendations for legislation, *supra,* pp. 16–17), are equally protected under both the majority (Slip Op. 9, 11, 17, 18) and dissenting views. The issue on which the Court divided in *Gravel* involved what the majority characterized as the Senator's "private publication" of the Pentagon Papers "through the cooperation of Beacon Press", an activity "in no way essential to the deliberations of the House." "Insofar as we are advised, neither Congress nor the full committee ordered or authorized the publication. We cannot but conclude that the Senator's arrangements with Beacon Press were not part and parcel of the legislative process" (Slip Op. 19). The dissenters' views were that Senator Gravel's activities in this regard were "as much

a part of the Speech or Debate Clause philosophy as mailing under a frank a Senator or a Congressman's speech across the Nation" (Douglas, J., Slip Op. 4); that even private publication fell within "the legislator's duty to inform the public about matters affecting the administration of government" (Brennan, J., Slip Op. 2). The ground of Mr. Justice Stewart's partial dissent was that the Court's protective order (Slip Op. 22) permitted questioning "before a grand jury about sources of information used in preparation for legislative acts," a matter which he thought was within the coverage of the Speech or Debate Clause (Stewart, J., Slip Op. 1; see also Brennan, J., Slip Op. 15–17).

No such questions are implicated in the instant case. Not one step in the entire process which culminated in the House's publication of its committee's report involved extra-legislative activity. Each and every phase of the investigation and report was part and parcel of the legislative process in the most routine sense. As such, *Gravel* stands as a unanimous holding that in no respect can the report "be questioned in any other Place". Petitioners' attempt to invoke "judicial oversight" (see *Gravel,* Slip Op. 11) of the portions of the report which they claim offended their "rights to privacy and the confidentiality of their school papers" (A. 10–11) is thus barred by the Speech or Debate Clause. Their complaints amount to an attempt to censor the report and are nothing more than an attack upon the judgment of the Committee in not disguising the identity of the students named in the records the Committee incorporated in the re-

port. But such matters of judgment, like questions of relevance, are for the legislators to decide. ". . . [T]he judiciary's view of the motives or germaneness of . . . [the Committee's] conduct . . . is irrelevant . . ." Douglas, J., dissenting in *Gravel,* Slip Op. 3–4. A difference of opinion as to the propriety of the Committee's judgment affords no basis for calling it into question "in any other Place". Refering to situations involving much more drastic consequences than are involved here, the Court said in *United States* v. *Brewster* (Slip Op. 15–16):

> * * * In its narrowest scope [i.e., "in the regular course of the legislative process", *id.* 24], the [Speech or Debate] Clause is a very large, albeit essential grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was conscious choice of the Framers.
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> * * * * * * *
>
> The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, * * *.

B. *The Individual Immunities of the Legislative Respondents.* These respondents fall into two categories—Members of the House Committee on the District of Columbia and the aides of the committee. As to the former, there can be no question of their absolute immunity under the Speech or Debate Clause.

As we have shown above, their every activity in the conduct of the investigation and study of the public school system of the District of Columbia pursuant to the authority of House Resolution 76—the employment of aides, the receipt of data gathered by the aides, the hearing of testimony regarding such data and other matters, the compilation of the report, including the Committee's findings and recommendations, the submission of the report to the House and its publication by the House—were activities in the regular course of the legislative process and so, under the unanimous holding in *Gravel* v. *United States,* were not subject to "question[ing] in any other Place". Slip Op. 9, 11, 17, 18; Douglas, J., dissenting, Slip Op. 3; Brennan, J., dissenting, Slip Op. 2–3.

The aide-respondents named in the complaint are Clark, Clerk of the Committee; Gasque, Staff Director; Garber, Counsel; Little, who, it was alleged, "as consultant to the Committee, . . . [was] responsible for the investigation which led to the report complained of herein and prepared said report"; Martin, "who as a sargent [sic] of the D.C. Metropolitan Police Department, and, as an investigator of the Committee, conducted the investigations which were used in the report complained of herein"; Spence, Public Printer (now deceased); and Kling, Superintendent of Documents (A. 7).

There can be no question as to the immunity under the Speech or Debate Clause of the regular staff of the Committee (respondents Clark, Gasque and Garber) and the temporary aides, respondents Little and Martin. Again, *Gravel* stands as a unanimous hold-

ing that all such aides, regular and temporary, are immune from "question[ing] in any other Place" to the same extent as are the members of Congress they assist in the performance of legislative activities. As the Court stated (Slip Op. 9–10):

> We agree with the Court of Appeals that for the purpose of construing the privilege a Member and his aide are to be "treated as one," *United States* v. *Doe*, 455 F.2d 753, 761 (CA1 1972); or, as the District Court put it: The "Speech or Debate Clause prohibits inquiry into things done by Dr. Rodberg as the Senator's [special and temporary (*id.* 2–3)] agent or assistant which would have been legislative acts, and therefore privileged, if performed by the Senator personally." *United States* v. *Doe*, 332 F.Supp. 930, 937–938 (Mass. 1971). Both courts recognized what the Senate of the United States urgently presses here: that it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the executive and accountability before a possible hostile judiciary, *United States* v. *Johnson*, 383 U.S. 169, 181 (1966)—will inevitably be diminished and frustrated.

See also Douglas, J., dissenting, Slip Op. 5: "The aides . . . must be taken as surrogates for the Senator and the confidences of the job that they enjoy are his confidences that the Speech or Debate Clause embrace"; Brennan, J., dissenting, Slip Op. 1: "I fully agree with the Court that a Congressman's immunity under the Clause must also be extended to his aides if it is to be at all effective."

There remains for consideration the status of respondents the Public Printer and the Superintendent of Documents under the immunity of the Speech or Debate Clause. In the instant case, the report was ordered printed and distributed pursuant to the rules of the House and the provisions of Title 44 of the United States Code (*supra,* pp. 3–5). Documents so printed and distributed are in no sense publications of the Government Printing Office; they are the publications of the Senate or House or Congress as a whole, as the case may be. They are published primarily for the information and use of the Members in the performance of their legislative duties. At the same time, the availability of such publications to the public through the facilities of Congress serves the important legislative function of informing the public concerning matters pending before Congress, including "matters affecting the administration of government." Brennan, J., dissenting in *Gravel* v. *United States,* Slip Op. 2, quoted at greater length, *supra,* p. 23. The printing and distribution of a legislative document pursuant to the direction of the legislative body are as much legislative acts as are the activities involved in the compilation of the document

itself. In the performance of his functions of printing and distributing legislative documents, the Public Printer (and the Superintendent of Documents insofar as he participates in such activities) is as much the "alter ego" (*Gravel* v. *United States,* Slip Op. 10) or "surrogate" (*id.,* Douglas, J., dissenting, Slip Op. 5) of the legislative body as are the other aides who assist the legislators in their legislative tasks. By the same token, applying the unanimous holding in *Gravel,* "the Speech or Debate Clause applies not only to a Member [in the instant case, the House action in printing the report] but also to his aides [here the Public Printer and the Superintendent of Documents] insofar as the conduct of the latter would be a protected legislative act if performed by the Member itself" (Slip Op. 11).

There was in this case no extra-legislative activity remotely resembling the "private publication by Senator Gravel through the cooperation of Beacon Press" of the Pentagon Papers, which the Court held "was in no way essential to the deliberations of the House" and was therefore "not part and parcel of the legislative process." *Gravel* (Slip Op. 19). Significantly, the Court noted in this connection that "[t]he Senator had conducted his hearings, the record and any report that was forthcoming were available both to his committee and the House" and that "[i]nsofar as we are advised, neither Congress nor the full committee ordered or authorized the publication" by the Senator (*ibid.*). The clear implication from this is that the printing and distribution of such a "record" or "report" pursuant to the Rules or authorization of

"the House" is "part and parcel of the legislative process" covered by the Speech or Debate Clause. It follows that the activities of the Public Printer and the Superintendent of Documents in printing and distributing the report in question pursuant to the rules of the House and the provisions of Title 44 of the United States Code (*supra,* pp. 3–5) fall well within the legislative immunity.

Moreover, if any further basis for immunizing the officials of the Government Printing Office is necessary, it is found in the Court's reference in *Gravel* to the decision in *Barr* v. *Matteo,* 360 U.S. 564 (1959), as support for its decision that legislative aides are protected by the Speech or Debate Clause. The Court said that the *Barr* decision "embraced similar views" in holding that "the executive privilege recognized in prior cases could not be restricted to those of cabinet rank" but extends as well to "' officers of lower rank in the executive hierarchy' " (Slip Op. 10). On a parity of reasoning, the privilege recognized in *Barr* extends to the Public Printer and the Superintendent of Documents. See also *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963), a case involving a question of immunity of a legislative employee. The complaint alleged that Wheeler, an investigator of a House committee, had filled in the plaintiff's name on a subpoena without authorization of the committee, the subpoena having been signed in blank by the chairman. The Court sustained dismissal of the complaint on another ground, but also clearly recognized that the test of liability was whether Wheeler was "acting sufficiently within the scope of his authority to bring the [im-

munity] doctrine into play." 373 U.S. at 651. The immunity referred to in *Wheeldin* was not that under the Speech or Debate Clause but the broad and absolute immunity of any government employee acting within the scope of his authority, or, as stated in *Barr* v. *Matteo,* 360 U.S. at 575, for "action . . . taken . . within the outer perimeter of [the] line of duty . . .".[10] Certainly the activities of the Public Printer and the Superintendent of Documents in the case at bar were activities "within the outer perimeter of [the] line of" their duties. (Cf. Pet. Br. 52–58.)

II

PETITIONERS' ATTEMPTS TO CIRCUMVENT THE UNANIMOUS HOLDING IN GRAVEL AS TO THE IMMUNITY OF THE LEGISLATIVE ACTIVITIES HERE ARE UNAVAILING

Quite surprisingly, petitioners do not even mention the unanimous agreement in *Gravel* that the proceedings of the subcommittee involved in that case and any record or report thereof were absolutely privileged as to both the Senator and his aides. They make no effort to explain why that holding does not govern this case. Instead, their principal argument (Pet. Br., Point I, pp. 16–35) amounts to a superficial *ad hominem* appeal that the committee's inclusion of the names of students in its report was wrongful and that there should therefore be a judicial remedy.

[10] Judicial officers are also immune from actions for civil damages caused by their judicial acts. *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); *Bradley* v. *Fisher*, 13 Wall. 335 (1872). See also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2, 1949), cert. denied, 339 U.S. 949, for the rationale of the official immunity doctrine by Judge Learned Hand.

As they conceive it, the remedy is a suit on the report against, *inter alia,* the Members and their aides. The gravamen of their complaint is the publication of the names in the report. Such publication, it is alleged, violated petitioners' "and their children's Constitutional rights and common law rights to privacy and the confidentiality of their school papers" (A. 10–11).

A. *There Has Been No Invasion of Privacy.* Petitioners roam at length among familiar cases under the First, Fourth, Fifth and Fourteenth Amendments (Br. 16 through 35), with particular emphasis upon the Fourth Amendment cases, in their search for a constitutional home for the cause of action they allege in their complaint (A. 9 through 11). However, they fail to cite any authority which demonstrates a constitutional right of privacy in school records which are the property of school officials. In this instance, in Petitioners' own words (See Complaint A. 9), the parties (Savoid and Irven) *"gave"* the complained of material to an aide of a Congressional Committee, which Committee has both the Constitutional and Congressional authority to investigate and report on agencies and departments of the District of Columbia Government. The school records which form the basis of this suit were rightfully kept and in the possession of school authorities. The records were voluntarily given to defendant Martin, an aide to a Congressional Committee. The records dealt with a subject matter in which the Committee had a legitimate right, if not duty, to investigate and report upon. Therefore, there was not an invasion of the "zone of privacy" which this Court recognized

and protected in *Griswold* v. *Connecticut*, 381 U.S. 617 (1965).

Having pointed out that there has been no invasion of the right of privacy, respondents respectfully suggest that in any event the consideration of that claim is secondary to the immunity granted by the Speech or Debate Clause. As the Court's opinion in *Brewster* (Slip Op. 15, 16) pointed out:

> Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was conscious choice of the Framers.

A footnote to this language from *Brewster* (Slip Op. 16, fn 11) further addressed itself to the scope of the immunity:

> "To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted .... The injury to the reputation of a private citizen is of less importance to the Commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions." *Coffin* v. *Coffin*, 4 Mass. 1, 28 (1808).

B. *The Speech or Debate Immunity is Dispositive of Petitioners' Claims.* More to the point, petitioners invoke (Br. 37–39) the *Kilbourn* v. *Thompson,* 103 U.S. 168 (1881), *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Powell* v. *McCormack,* 395 U.S. 486 (1969), line of cases and the Court's characterization of those cases in *Gravel* as creating an exception from the Speech or Debate Clause for "illegal or unconstitutional conduct" (Slip Op. 13) as support for their attempt to pierce the privilege on the ground that the report violated their and their children's right of "privacy". The answer to this is that we are here concerned with a House report; and, as we have seen, *Gravel* stands as a unanimous holding that such a purely legislative document and all the Members and aides who had any part in its preparation and official publication are covered by the Clause.

There was not here, as there was in *Kilbourn, Eastland, Powell* and *Gravel* (and *Brewster* as well), any action by Members or their aides which went beyond the legitimate, and therefore protected, legislative activities involved in the publication of the report. There was no arrest by an employee of the House (*Kilbourn*), no conspiracy by an aide "to carry out an illegal seizure of records" (the characterization of *Eastland* in *Gravel,* Slip Op. 13), no exclusion of a Representative-elect by House employees (*Powell*), and no arrangement for private publication of documents which had been introduced into the record of a congressional hearing (*Gravel*). *From beginning to end*—from the House's authorization of the Com-

mittee's investigation and study of the public school system of the District of Columbia (H. Res. 76, *supra,* p. 5) to the printing and publication of the report—the activities connected with the report were protected as ". . . 'things generally done in a session of the House . . . in relation to the business before it.'" *Gravel,* Slip Op. 11.

The distinction between such covered legislative activities and extra-legislative activities which are not covered by the Speech or Debate Clause was sharply drawn in the very sentence in which the Court in *Gravel* excepted "illegal or unconstitutional conduct" from its shield: the Court went on to say that the Clause nevertheless applies where it is "essential to foreclose executive control [i.e., "question[ing] in any other place"] of legislative speech or debate and associated matters such as voting and *committee reports and proceedings*" (Slip Op. 13–14; emphasis added). As we read this sentence (and the opinions in *Gravel* as a whole), the immunity applies absolutely to a committee report and all the other legislative activities associated with it. It does not matter that some may think, e.g., that the Committee acted unwisely in its investigation, or that it went into irrelevant matters, or that its judgment in deciding upon the matters from its record to be included in its report was unfortunate or offensive. See Douglas, J., dissenting in *Gravel,* Slip Op. 3, *supra,* p. 20. For as the Court said in *United States* v. *Brewster,* the Speech or Debate Clause ". . . tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens . . ." (Slip Op. 16).

The immunity sustained in *Gravel* and the "impunity" referred to in *Brewster* are complete; they foreclose any judicial oversight, whether by a suit for an injunction against publication of a legislative document, as here, or for a declaratory judgment or for damages, which petitioners also seek (A. 11–12). For the bar of the Speech or Debate Clause is against any "question[ing] in any other Place".

Even so, petitioners contend that the bar does not apply here. In the last analysis their whole case comes down to this: there was an unconstitutional invasion of the right of privacy in the means whereby the Committee obtained the records included in the report about which they complain; that alleged unconstitutional action tainted the report itself; ergo, they are entitled to sue the Members and their aides on the report (Br. 40–47).

Preliminarily, we note petitioners' subsidiary contention that the enabling resolution of the House (H. Res. 76, *supra,* pp. 5–6) did not authorize the Committee to procure the school records in the manner in which they were obtained, i.e., by respondent investigator Martin's obtention of the records from respondents Savoid and Irven, who were, respectively, the Principal and a teacher at Jefferson Junior High School. The Resolution, petitioners argue "limited the method and circumstances of document production or procurement *to formal procedures during actual hearings of the Committee or subcommittee*" (Br. 42). The contention is frivolous. The Resolution authorized the Committee to "require, by subpoena *or otherwise,* . . . the production of such books, records, cor-

respondence, memorandums, papers and documents as it deems necessary" (emphasis added). The records were obtained by Martin in his capacity as an investigator of the Committee and they were made part of the Committee's record and report of its authorized investigation. It needs no citation of authority to demonstrate that the method used by the Committee in obtaining data relevant to its investigation is commonplace. The Speech or Debate Clause precludes petitioners from questioning the regularity of the Committee's procedures in this regard. For as the Court said in *Gravel* (Slip Op. 9), it was "incontrovertible" "that the Speech or Debate Clause . . . protect[ed] him from criminal or civil liability and from questioning elsewhere than in the Senate, with respect to the events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record." "One of the things normally done by a member 'in relation to the business before it' is the introduction of documents or other exhibits in the record the committee or subcommittee is making. . . ." *Id.*, Douglas, J., dissenting, Slip Op. 3. And the immunity so expressed "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself". *Gravel,* Slip Op. 11.

Petitioners also make the subsidiary contention (Br. 42–47) that the Committee's introduction of the school records into the record and report of its investigation was in violation of House Rule XI–27(m), which provides that "If the committee determines that evidence or testimony at an investigative hearing may

tend to defame, degrade, or incriminate any person, it shall—(1) receive such evidence or testimony in executive sessions" and afford such person an opportunity to appear. The very terms of this rule refute the contention, for it leaves the determination of such questions to "the committee". And again, the unanimous holding in *Gravel* as quoted above provides the conclusive answer.

Petitioners' assertion of unconstitutionality in the "method of obtaining and publishing petitioners' private, confidential and privileged school records" (Br. 40) is addressed to the activities of the Committee's investigator (respondent Martin) in obtaining the records from employees of the school system (respondents Savoid and Irven). It is the premise upon which their whole case is based. In this way they seek to bring the case within *Gravel's* exception of "illegal or unconstitutional conduct" (Slip Op. 13–14) and, more specifically (Br. 38), *Gravel's* characterization of *Dombrowski* v. *Eastland, supra,* as holding that the Speech or Debate Clause does not protect Members or their aides "if in order to secure information for a hearing . . . [they] seize the property or invade the privacy of a citizen" (Slip Op. 14).

The answers to this contention are manifold. In the first place, the Committee's report is, as we have seen, absolutely privileged, regardless of what it contains. For it, as much as words spoken on the floor of the House, is legislative "speech or debate". The Members and their aides who participated and assisted in the legislative activities of conducting hearings, introducing documents and exhibits into the record,

including the school records in question, and compiling and publishing the legislative report on the basis of the record so made are equally privileged.

This leaves for consideration only the procurement of the school records by respondent Martin, the investigator of the Committee. Petitioners would have it that his conduct was an unconstitutional invasion of their privacy as in *Dombrowski* v. *Eastland, supra.* In answer, we start with the allegations of the complaint. All that was alleged in this respect was that "[u]pon information and belief . . . defendant Savoid [Principal] *gave* defendant Martin copies of the disciplinary letters printed in the report and other materials and . . . defendant Irven [teacher] *gave* defendant Martin copies of the attendance lists, the school test papers also printed in the report and other materials. Upon information and belief, defendants Savoid and Irven were not authorized to release these materials" (A. 9; emphasis added). We do not find in these allegations the slightest resemblance to *Eastland.* There the "committee counsel was charged with conspiring with state officials to carry out an illegal seizure of records which the committee sought for its own proceedings" (*Gravel,* Slip Op. 13) and ". . . relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." *Id.* 14. Petitioners cannot remake their case here to fit the exception of *Eastland* by their gratuitous assertions that respondent Martin acted "in a surreptitious and clandestine manner" (Br. 39); that he "surreptitiously . . . obtain[ed] the private and confidential documents involved here" (*id.* 41); that

he obtained the records "through surreptitious and clandestine private meetings . . . with a teacher and the principal of the Jefferson Junior High School" (*id.* 42); and that he "seize[d] petitioners' private school records" (*id.* 46). These afterthoughts are unworthy.[11] *Eastland* was on the books long before petitioners filed their complaint. If they had a cause of action against respondent Martin under that decision, they should have alleged it. It is too late in the day for them to attempt to contrive a solution to the dilemma confronting them by the unanimous holding in *Gravel* that all legislative acts and all legislative aides participating in such acts are privileged under the Speech or Debate Clause.

Petitioners assertions that the records were their "private school records" (Br. 40, 46) are equally baseless. The records were the records of the school system. Petitioners had no proprietary or possessory interest in them.[12]

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[11] The Committee's report describes how these materials were obtained. The report incorporates verbatim interviews with respondents Irven and Savoid (pp. 210–212, 254–256). The materials are set out as "attachments" (p. 212) and "enclosures" (p. 254) accompanying the interviews. The test papers, the report states, were "submitted" by Irven "to show the poor reading ability of most of her students" (p. 223; see also p. 243). another attachment was a report by Irven to Savoid on the conduct of a student (p. 253), and the disciplinary letters were enclosures accompanying an interview with Savoid and his Assistant Principal (pp. 254–258).

[12] The Joint Statement of the Superintendent of the D.C. Public Schools and the President of the Board of Education (A. 52–53) and the Board's Policy Statement Regarding Congressional Inquiries (A. 42–43; see Pet. Br. 57), which were submitted to the courts below, were issued subsequent to the release of the Committee's report.

But even such restrictions as are referred to in the preceding footnote cannot prevail against the plenary power of Congress to legislate for the District of Columbia and, specifically, the House's authorization to its Committee on the District of Columbia "to conduct a full and complete investigation and study of . . . the organization, management, operation, and administration of any independent agency or instrumentality of government operating solely in the District of Columbia" (H. Res. 76, *supra,* p. 5). The Resolution authorized the Committee "to require, by subpena or otherwise, . . . the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary". If the records had been produced pursuant to the Committee's subpoena, as authorized by the Resolution, there would be no question as to the legality of their obtention. The issuance of a subpoena under such authority is itself a legislative act protected by the Speech or Debate Clause. The fact that the records were "given" by their custodians to respondent Martin in his capacity as an aide of the Committee does not somehow convert their obtention into an unconstitutional act.

Finally, *Gravel* again provides the conclusive answer to petitioners' attack upon respondent Martin's conduct. If the Chairman of the Committee, respondent McMillan, had himself received the records from respondents Savoid and Irven for the purposes of the Committee's investigation and study, there would be no question as to the application of the Speech or Debate Clause. Respondent Martin stands in the same

protected position. For under the unanimous holding in *Gravel*, ". . . the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." Slip Op. 11. The aide, respondent Martin, "must [in this respect] be treated as the . . . [Member's] alter ego" (*id.* 10) or "surrogate" (*id.*, Douglas, J., dissenting, Slip Op. 5).

III

THE LEGISLATIVE ACTION INVOLVED HERE DOES NOT CONSTITUTE A BILL OF ATTAINDER

Petitioners' final claim of violation of a constitutional right is that the report in question constitutes a bill of attainder and as such is not protected by the Speech or Debate Clause (Br. 48–52). The contention is frivolous.

By definition—

> . . . "a bill of attainder, by the common law, as our fathers imported it from England and practiced it themselves, before the adoption of the Constitution, was an act of sovereign power *in the form of a special statute* * * * by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment per legem terrae." Farrar, Manual of the Constitution (1867) 419. And see 2 Story, Commentaries on the Constitution (5th ed., 1891) 216; 1 Cooley, Constitutional Limitations (8th ed., 1927) 536. It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's

> interests indicated a judicial trial, that the Constitution prohibited. . . . *United States* v. *Lovett,* 328 U.S. 303, 322 (1946), Frankfurter, J., concurring. [Emphasis added.]

However the term may be defined, it is clear that a bill of attainder is a legislative enactment. This is demonstrated by the very authorities petitioners cite in support of their contention—*Cummings* v. *Missouri,* 4 Wall. 277 (1867); *United States* v. *Lovett, supra; United States* v. *Brown,* 381 U.S. 437 (1965); *Wisconsin* v. *Constantineau,* 400 U.S. 433, 443 (1971), Black, J., dissenting. All of these cases involved a legislative act in the form of an enactment.[13] Thus, petitioners' attempt to equate the publication of the report to an enacted law, the only form of legislative action which can constitute a bill of attainder, is contrary to reason and authority.

To state the proposition another way, the Speech or Debate Clause applies to "Committee reports, resolutions, and the act of voting . . . '[i]n short, . . . things generally done in a session of the House by one of its members in relation to the business before it.'" *Gravel* v. *United States,* Slip Op. 11. Such committee reports and other "things generally done" may eventuate in "an act of sovereign power, in the form of a

[13] In the *Cummings* case the bill of attainder was enacted as part of the post-Civil War constitution of Missouri. The *Constantineau* case involved administrative action under the authority of a state statute, and does not involve a bill of attainder. In the dissenting opinion upon which petitioners rely (Pet. 22), Mr. Justice Black said only that the effect of the "sweeping powers" granted by the statute "is practically the same as that of an old common-law bill of attainder." 400 U.S. at 444.

special statute" (*United States* v. *Lovett, supra*) which constitutes a bill of attainder. But such an eventuality would not vitiate the immunity the Speech or Debate Clause affords for the legislative activities which led to the unconstitutional enactment. The Speech or Debate Clause and the Bill of Attainder Clause are operative independently of each other. Here the only legislative acts involved were activities to which the Speech or Debate Clause applies. No "special statute" eventuated to bring the Bill of Attainder Clause into play.

IV

SEPARATION OF POWERS

The Federal Courts do not have jurisdiction to interfere with the publication and distribution of a House Committee report because Article I, Section 1 of the Constitution vests "all legislative power of the United States" in the Congress of the United States. There should be no doubt that a Report of a Congressional Committee is a legislative prerogative. Judicial review of the contents of a report and enjoining of its publication or distribution are assumptions of legislative power and contrary to the Constitution.

Petitioners have requested that certain material be expunged from the Committee report, and the Court of Appeals (A. 54–55) enjoined certain of the non-Member respondents from printing and distributing the report "unless references to the names and addresses of students . . . are deleted." This injunction was continued in effect pending final action by

this Court (A. 116). This selective censorship of a legislative act by the courts is a dangerous precedent which strikes at the foundation of our Constitutional system of government.

The Supreme Court in *O'Donoghue* v. *United States,* 289 U.S. 516 (1933), at 530, struck down an attempted Congressional reduction of judiciary salaries, and recognized the independence of each of the three branches of the Federal Government when it succinctly stated: "The Constitution, in distributing the powers of government, creates three distinct and separate departments—the legislative, the executive, and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital . . ."

In a case similar to this, *Methodist Federation for Social Action* v. *Eastland,* 141 F.Supp 729 (1956), a three-judge court held that it was without authority to enjoin the printing and distribution of a Senate Document.[14] Edgerton, CJ., speaking for the Court said (at 731–732),

[14] In this connection, we observe, not *in terrorem*, that the record in this case contains a reference to an incident of recent date which demonstrates the wisdom of the abstentions adjured in the *Methodist Federation* case. The district court below referred (A. 39) to *Hentoff* v. *Ichord*, 318 F. Supp. 1175 (D.D.C. 1970), a case in which the plaintiffs sought to enjoin members of the House Committee on Internal Security, its Chief Counsel, the Public Printer and the Superintendent of Documents from the imminent publication of a report of the Committee entitled, "Limited Survey of Honoraria Given Guest Speakers for Engagements at Colleges and Universities". The report presented "the results of a survey conducted by the Committee's staff without use of any formal process whereby the staff "by correspondence obtained information from a number of institutions of higher learning, listing speakers who had appeared on their campuses". The names thus obtained were "checked against

Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement. This is equally true whether the statement is correct or not,

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Committee sources in an effort to determine whether or not any of the speakers had been associated with one or more of 12 organizations. In this fashion the Committee isolated the names of 65 individuals. The Report . . . listed the names of each of the individuals so chosen, their alleged associations or affiliations and the honoraria paid them. . . . The Report raised the inference . . . that the sums paid for the speeches might have been made available . . . to the organizations" (id. 1177). The court dismissed the suit as to all parties except the Public Printer and the Superintendent of Documents but enjoined "them from printing and/or distributing or directly or indirectly causing to be printed or distributed, any copy of" the report on the ground that "without any proper legislative purpose [it] infringe[d] on the rights of individuals named therein as protected by the First Amendment . . ." (id. 1183). Beyond noting that the rationale of this decision was, in our view, overruled in *Gravel*, it is significant that the decision was met by House Resolution 1306, 91st Cong., 2d Sess., 116 Cong. Rec. 41355, which the District Judge below, declining to follow his colleague in the *Hentoff* case, read into his oral opinion dismissing the complaint (A. 39–40). This resolution "ordered" the Public Printer and the Superintendent of Documents to "forthwith print, publish and distribute to and for the use of the House of Representatives, the Committee on Internal Security of said House, and those entitled to receive them, the usual number of copies of the report (No. 91–1732) of said Committee on Internal Security titled, 'Report of Inquiry Concerning Speakers' Honoraria at Colleges and Universities', which has this day been duly reported to the House." It "enjoined" "[a]ll persons" from "doing any act" to "obstruct[s], or prevent[s] the performance of [such] work" and from "molesting, intimidating, damaging, arresting, imprisoning, or punishing any person because of his participation in, or performance of, such work". Finally, the Resolution directed that "[c]opies of this resolution . . . be forthwith furnished . . . to . . . the clerks of the United States District Court and of the United States Court of Appeals from the District of Columbia". This

> whether it is defamatory or not, and whether it is or is not made after a fair hearing. Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.
>
> * * * * *
>
> . . . We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing a Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem.

The decision in *Methodist Federation* was based on the Speech or Debate Clause but it is to be noted that the court's language bespeaks as well the constitutional doctrine of separation of powers. The Clause is an expression of a specific aspect of that doctrine. (Cf. Pet. Br. 32–37)

Resolution was subsequently characterized as an expression of the House's "displeasure with, and assert[ion of] its independence from what it deemed an intrusion by the judiciary into its prerogatives with respect to its own documents.". *Soucie* v. *David*, 448 F.2d 1067, 1082 (C.A.D.C. 1971), Wilkey, C. J., concurring). Moreover, the District Court Judge who issued the injunction against the Public Printer and the Superintendent of Documents refused to extend that order to cover the second report even though it was conceded to be a restatement of the earlier report.

In *Hearst* v. *Black*, 87 F. 2d 68 (C.A.D.C 1936), plaintiff Hearst sued to enjoin a Special Committee of the United States from copying and using telegraphic messages in the possession of telegraph companies. Reminiscent of petitioners' allegations in the present case, Hearst alleged that this conduct by the Senate Committee deprived him of his constitutional rights and liberties under the First, Fourth, and Fifth Amendments to the Constitution. In the Hearst case, a statute (47 U.S.C. 605) prohibited telegraph companies from disclosing the contents of transmissions. Refusing to say to the Committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions, the Court (at 87 F. 2d 71–2) found the universal rule to be:

> . . . that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised is not a subject for judicial interference.
>
> The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. Nothing is better settled than that each of the three great departments of government shall be independent and not subject to be controlled directly or indirectly by either of the others.
>
> * * * * *

> If courts cannot enjoin the enactment of unconstitutional laws—as to which proposition there can be no doubt—then by the same token they cannot enjoin legislative debate or discussion of constitutional measures because of the incidental disclosure or publication of knowledge unconstitutionally acquired. If it be insisted that this is the acknowledgement of a power whose plenitude may become a cataclysm, the answer is that the Congress "is as much the guardian of the liberties and welfare of the people as the courts".

Questioning the official publication of a Committee report threatens "the integrity or independence of the House by impermissibly exposing its deliberations to" judicial or executive influence. *Gravel,* Slip Op. 19. To question Congressional discretion as to what facts can or cannot be included in a Committee report, or to enjoin publication or distribution of a Committee report, would be an exercise of legislative power and therefore a usurpation of that power.

Upon ascertaining that a matter is a legislative act, the Courts should not question the wisdom or motives of those exercising their legitimate Congressional discretion.

CONCLUSION

The legislative activities of the legislative respondents involved in this case are immune from "question[ing] in any other Place". The judgment below should be affirmed as to such respondents.

Respectfully submitted.

FRED M. VINSON, JR.,
ROBERT S. ERDAHL,
800 17th Street, NW.,
Washington, D.C. 20006.

WILLIAM C. CRAMER,
JAMES S. RUBIN,
RICHARD M. HABER,
BENTON L. BECKER,
Suite 4100,
485 L'Enfant Plaza, SW.,
Washington, D.C. 20024.

WALTER C. DEVAUGHN,
General Counsel,
Government Printing Office,
Washington, D.C. 20401,

SEPTEMBER 1972.

U.S. GOVERNMENT PRINTING OFFICE

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOE ET AL. *v.* McMILLAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-6356. Argued December 13, 1972—Decided May 29, 1973

Petitioners, parents of District of Columbia (D. C.) school children, brought this action seeking damages and declaratory and injunctive relief for invasion of privacy that they claimed resulted from the dissemination of a congressional report on the D. C. school system that included identification of students in derogatory contexts. The named defendants included members of a House committee, Committee employees, a Committee investigator, and a consultant; the Public Printer and the Superintendent of Documents; and officials and employees connected with the school system. The Court of Appeals affirmed the District Court's dismissal of the complaint on the grounds that the first two categories of defendants were immune by reason of the Speech or Debate Clause, and that the D. C. officials and the legislative employees were protected by the official immunity doctrine recognized in *Barr* v. *Matteo*, 360 U. S. 564. *Held:*

1. The congressional committee members, members of their staff, the consultant, and the investigator are absolutely immune under the Speech or Debate Clause insofar as they engaged in the legislative acts of compiling the report, referring it to the House, or voting for its publication. Pp. 4–7.

2. The Clause does not afford absolute immunity from private suit to persons who, with authorization from Congress, perform the function, which is not part of the legislative process, of publicly distributing materials that allegedly infringe upon the rights of individuals. The Court of Appeals, therefore, erred in holding that respondents who (except for the Committee members and personnel) were charged with such public distribution were protected by the Clause. Pp. 7–10.

3. The Public Printer and the Superintendent of Documents are protected by the doctrine of official immunity enunciated in

Syllabus

Barr v. *Matteo, supra,* for publishing and distributing the report only to the extent that they served legitimate legislative functions in doing so, and the Court of Appeals erred in holding that their immunity extended beyond that limit. Pp. 10–17.

— U. S. App. D. C. —, 459 F. 2d 1304, reversed in part, affirmed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BRENNAN and MARSHALL, JJ., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., joined. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and BLACKMUN, J., joined, and in Part I of which STEWART, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–6356

John Doe et al., Petitioners, *v.* John L. McMillan et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr* v. *Matteo*, 360 U. S. 564 (1959); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. Res. No. 76, 91st Cong., 1st Sess., 115 Cong Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely within the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

report, H. R. Rep. No. 91–1681, 91st Cong., 2d Sess. (1970), represented to be a summary of the Subcommittee's investigation and hearings devoted to the public school system of the District of Columbia. On the same day, the report was referred to the Committee of the Whole House on the State of the Union and was ordered printed. 116 Cong. Rec. 40311 (1970). Thereafter, the report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.

The 450-page report included among its supporting data some 45 pages that are the gravamen of petitioners' suit. Included in the pertinent pages were copies of absence sheets, lists of absentees, copies of test papers, and documents relating to disciplinary problems of certain specifically-named students.[1] The report stated that these materials were included to "give a realistic view" of a troubled school and "the lack of administrative efforts to rectify the multitudinous problems there," to show the level of reading ability of seventh graders who were given a fifth-grade history test, and to illustrate suspension and disciplinary problems.[2]

On January 8, 1971, petitioners, under pseudonyms, brought an action in the United States District Court for the District of Columbia on behalf of themselves, their children, and all other children and parents similarly situated. The named defendants were (1) the Chair-

[1] The Court of Appeals' opinion terms the materials "somewhat derogatory." The absentee lists named students who were frequent "class cutters." Of the 29 test papers published in the report, 21 bore failing grades; all included the name of the student being tested. The letters, memoranda, and other documents relating to disciplinary problems detailed conduct of specifically named students. Some of the deviant conduct described involved sexual perversion and criminal violations.

[2] The information was obtained voluntarily from District of Columbia school personnel by Committee investigators.

man and members of the House Committee on the District of Columbia; (2) the Clerk, Staff Director, and Counsel of the Committee; (3) a consultant and an investigator for the Committee; (4) the Superintendent of Documents and the Public Printer; (5) the President and members of the Board of Education of the District of Columbia; (6) the Superintendent of Public Schools of the District of Columbia; (7) the principal of Jefferson High School and one of the teachers at that school; and (8) the United States of America.

Petitioners alleged that, by disclosing, disseminating, and publishing the information contained in the report, the defendants had violated the petitioners' and their children's statutory, constitutional, and common law rights to privacy and that such publication had caused and would cause grave damage to the children's mental and physical health and to their reputations, good names, and future careers. Petitioners also alleged various violations of local law. Petitioners further charged that "unless restrained, defendants will continue to distribute and publish information concerning plaintiffs, their children and other students." The complaint prayed for an order enjoining the defendants from further publication, dissemination, and distribution of any report containing the objectionable material and for an order recalling the reports to the extent practicable and deleting the objectionable material from the reports already in circulation. Petitioners also asked for compensatory and punitive damages.[3]

The District Court, after a hearing on motions for a temporary restraining order and for an order against

[3] The prayer also included a request for an injunction prohibiting future disclosure of "confidential information" and requiring the District of Columbia School Board "to establish rules and regulations regarding the confidentiality of school papers and the right of privacy of students in the schools of the District of Columbia."

further distribution of the report, dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged.[4] A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. Without determining whether the complaint stated a cause of action under the Constitution or any applicable law, the majority held that the Members of Congress, the Committee staff employees, and the Public Printer and Superintendent of Documents were immune from the liability asserted against them because of the Speech or Debate Clause and that the official immunity doctrine recognized in *Barr* v. *Matteo, supra,* barred any liability on the part of the District of Columbia officials as well as the legislative employees.[5] We granted certiorari, 408 U. S. 922.

I

To "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States,* 408 U. S. 606, 617 (1972), Art. I, § 6, cl. 1, of the Constitution provides that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place."

> "The Speech or Debate Clause was designed to assume a co-equal branch of the government wide freedom of speech, debate, and deliberation without

[4] The District Court also dismissed the suit against the United States for failure to exhaust administrative remedies. 28 U. S. C. § 2675 (a). That ruling is not challenged here.

[5] The Court of Appeals also independently found that injunctive relief would not issue because of assurances from the federal defendants that no republication or further distribution of the Report was contemplated. With respect to petitioners' request for injunctive relief against the District of Columbia officials, the Court found that, because of the adoption of new policies concerning confidential information, "there is no substantial threat of future injury to appellants."

> intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Gravel* v. *United States, supra,* at 616.[6]

The Speech or Debate Clause has been read "broadly to effectuate its purposes," *United States* v. *Johnson,* 383 U. S. 169, 180 (1966); *Gravel* v. *United States, supra,* at 624, and includes within its protections anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U. S. 168, 204 (1880); *United States* v. *Johnson, supra,* at 179; *Gravel* v. *United States, supra,* at 624; *Powell* v. *McCormack,* 395 U. S. 486, 502 (1969); *United States* v. *Brewster,* 408 U. S. 501, 509, 512–513 (1972). Thus "voting by Members and committee reports are protected" and "a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.'" *Gravel* v. *United States, supra,* at 624.

Without belaboring the matter further, it is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the committee staff, from the consultant, or from the investigator, for introducing material at committee hearings that

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[6] "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *United States* v. *Brewster,* 408 U. S. 501, 508 (1972).

identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries. At least in these respects, the actions upon which petitioners sought to predicate liability were "legislative acts," *Gravel* v. *United States*, *supra*, at 618, and, as such, were immune from suit.[7]

Petitioners argue that including in the record of the hearings and in the Report itself materials describing particular conduct on the part of identified children was actionable because unnecessary and irrelevant to any legislative purpose. Cases in this Court, however, from *Kilbourn* to *Gravel* pretermit the imposition of liability on any such theory. Congressmen and their aides are immune from liability for their actions within the "legislative sphere," *Gravel* v. *United States*, *supra*, at 624–625, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes. Although we might disagree with the Committee as to whether it was necessary, or even remotely useful, to include the names of individual children in the evidence submitted to the Committee and in the Committee Report, we have no authority to oversee the judgment of the Committee in this respect or to impose liability on them if we disagree with their legislative judgment. The acts of authorizing an investigation pursuant to

[7] In *Gravel*, we held that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel* v. *United States*, 408 U. S., at 618.

which the subject materials were gathered, holding hearings where the materials were presented, preparing a Report where they were reproduced, and authorizing the publication and distribution of that Report were all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.*, at 625. As such, the acts were protected by the Speech or Debate Clause.

Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause. "[T]he Clause has not been extended beyond the legislative sphere," and "[l]egislative acts are not all-encompassing." *Id.*, at 624–625. Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct "though generally done, is not protected legislative activity." *Id.*, at 625; *United States* v. *Johnson, supra.* Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process. *Gravel* v. *United States, supra.*

The proper scope of our inquiry, therefore, is whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals. The respondent insists that such public distributions are protected, that the Clause immunizes not only publication for the information and use of Members in the performance of their

legislative duties but also must be held to protect "publications to the public through the facilities of Congress." Public dissemination, it is argued, will serve "the important legislative function of informing the public concerning matters pending before Congress . . . ." Brief for Legislative Respondents, p. 27.

We do not doubt the importance of informing the public about the business of Congress. However, the question remains whether the act of doing so, simply because authorized by Congress, must always be considered "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" with respect to legislative or other matters before the House. *Gravel* v. *United States, supra,* at 625. A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report.[8] The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process "by which members participate in committee and House proceedings." *Gravel* v. *United States, supra,* at 625. By the same token, others, such as the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distributions of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity.

Members of Congress are themselves immune for ordering or voting for a publication going beyond the reason-

[8] The republication of a libel, in circumstances where the initial publication is privileged, is generally unprotected. See generally Harper & James, The Law of Torts, § 5.18 (1956); Prosser, Torts, 766–769 (4th ed. 1971). See also *Gravel* v. *United States,* 408 U. S., at 622–627.

able requirements of the legislative function, *Kilbourn* v. *Thompson*, *supra*, but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the sergeant-at-arms in *Kilbourn* v. *Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority." *Id.*, at 200.[9] See also *Powell* v. *McCormack*, 395 U. S., at 504; cf. *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967). The Clause does not protect "criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction." *Gravel* v. *United States*, *supra*, at 622. Neither, we think, does it immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function.[10]

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[9] "In *Kilbourn*, the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest." *Gravel* v. *United States*, 408 U. S., at 618.

[10] Although, as pointed out by my dissenting Brethren, the acts of Senator Gravel were not ordered or authorized by Congress or a congressional committee, *Gravel* v. *United States*, 408 U. S., at 626, the fact of congressional authorization for the questioned act is not sufficient to insulate the act from judicial scrutiny. In *Powell* v. *McCormack*, 395 U. S. 486 (1969), for instance, we reviewed the acts of House employees "acting pursuant to express orders of the House." *Id.*, at 504. We concluded that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." *Ibid.* See also *Kilbourn* v.

Thus we cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be. We cannot believe that the purpose of the Clause—"to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States*, *supra*, at 617; *Powell* v. *McCormack*, *supra*, at 502; *United States* v. *Johnson*, *supra*, at 181—will suffer in the slightest if it is held that those who, at the direction of Congress or otherwise, distribute actionable material to the public at large have no automatic immunity under the Speech or Debate Clause but must respond to private suits to the extent that others must respond in light of the Constitution and applicable laws.[11] To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law.

Contrary to the suggestion of our dissenting Brethren, we cannot accept the proposition that our conclusion

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Thompson, 103 U. S. 168 (1881); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967).

[11] We have no occasion in this case to decide whether or under what circumstances, the Speech or Debate Clause would afford immunity to distributors of allegedly actionable materials from grand jury questioning, criminal charges, or a suit by the executive to restrain distribution, where Congress has authorized the particular public distribution.

that general, public dissemination of materials otherwise actionable under local law is not protected by the Speech or Debate Clause, will seriously undermine the "informing function" of Congress. To the extent that the Committee report is printed and internally distributed to Members of Congress under the protection of the Speech or Debate Clause, the work of Congress is in no way inhibited. Moreover, the internal distribution is "public" in the sense that materials internally circulated, unless sheltered by specific congressional order, are available for inspection by the press and by the public. We only deal, in the present case, with general, public distribution beyond the halls of Congress and the establishments of its functionaries, and beyond the apparent needs of the "*due* functioning of the [legislative] process." *United States* v. *Brewster*, *supra*, at 516.

That the Speech or Debate Clause has finite limits is important for present purposes. The complaint before us alleges that the respondents caused the committee report "to be distributed to the public," that "distribution of the report continues to the present," and that "unless restrained, defendants will continue to distribute and publish" damaging information about petitioners and their children. It does not expressly appear from the complaint, nor is it contended in this Court, that either the Members of Congress or the Committee personnel did anything more than conduct the hearings, prepare the Report, and authorize its publication. As we have stated, such acts by those respondents are protected by the Speech or Debate Clause and may not serve as a predicate for a suit. The complaint was therefore properly dismissed as to these respondents. Other respondents, however, are alleged to have carried out a public distribution and to be ready to continue such dissemination.

In response to these latter allegations, the Court of Appeals, after receiving sufficient assurances from the respondents that they had no intention of seeking a republication or carrying out further distribution of the report, concluded that there was no basis for injunctive relief. But this left the question whether any part of the previous publication and public distribution by respondents other than the Members of Congress and Committee personnel went beyond the limits of the legislative immunity provided by the Speech or Debate Clause of the Constitution. Until that question was resolved, the complaint should not have been dismissed on threshold immunity grounds, unless the Court of Appeals was correct in ruling that the action against the other respondents was foreclosed by the doctrine of official immunity, a question to which we now turn.[12]

II

The official immunity doctrine, which "has in large part been of judicial making," *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959), confers immunity on government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effec-

[12] While an inquiry such as is involved in the present case, because it involves two coordinate branches of Government, must necessarily have separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts of Congress, see, *e. g.*, *Kilbourn* v. *Thompson*, *supra*; *Dombrowski* v. *Eastland*, *supra*, even when the Executive Branch is also involved, see, *e. g.*, *United States* v. *Brewster*, *supra*; *Gravel* v. *United States*, *supra*.

tive administration of policies of government." *Id.*, at 571.[13] The official immunity doctrine seeks to reconcile two important considerations—

> "[O]n the one hand, the protection of the individual citizens against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Id.*, at 565.

In the *Barr* case, the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes. *Id.*, at 573; see also *Tenney* v. *Brandhove*, 341 U. S., at 378; *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967). Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. *Barr* v. *Matteo*, *supra*, at 569; *Pierson* v. *Ray*, 386 U. S. 547, 553–555 (1967). But policemen and like officials apparently enjoy a more limited privilege. *Id.*, at 555–558. Also, the Court determined in *Barr* that the scope of immunity from defamation suits should be determined by the relation of the publication complained of to the duties entrusted to the officer. *Barr* v. *Matteo*, *supra*, at 573–574; see also the companion case, *Howard* v. *Lyons*, 360 U. S. 593, 597–598 (1959). The scope of immunity has always been tied to the "scope of authority." *Wheeldin* v. *Wheeler*, 373 U. S. 647, 651 (1963). In the legislative

[13] Both before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch. See *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967).

context, for instance, "[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove, supra,* at 377. Thus, we have recognized "the immunity of legislators for acts within the legislative role," *Pierson* v. *Ray, supra,* at 554 (1967), but have carefully confined that immunity to protect only acts within "the sphere of legitimate legislative activity." *Tenney* v. *Brandhove, supra,* at 376; cf. *Powell* v. *McCormack, supra,* at 486.

Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweighs the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents—the Public Printer and the Superintendent of Documents—should be accorded absolute immunity in this case. Of course, to the extent that they serve legislative functions, the performance of which would be immune conduct if done by congressmen, these officials enjoy the protection of the Speech or Debate Clause. Our inquiry here, however, is whether, if they participate in publication and distribution beyond the legislative sphere, and thus beyond the protection of the Speech or Debate Clause, they are nevertheless protected by the doctrine of official immunity. Our starting point is at least a minimum familiarity with their functions and duties.

The statutes of the United States create the office of Public Printer to manage and supervise the Government Printing Office, which, with certain exceptions, is the authorized printer for the various branches of the Federal Government. 44 U. S. C. § 301. "Printing and binding may be done at the Government Printing Office only when authorized by law." § 501. The Public Printer

is authorized to do printing for Congress, §§ 701–741, 901–910, as well as for the Executive and Judicial Branches of Government, §§ 1101–1123. The Public Printer is authorized to appoint the Superintendent of Documents with duties concerning the distribution and sale of documents. §§ 1701–1722.

Under the applicable statutes, when either House of Congress orders a document printed, the Printer is to print the "usual number" unless a greater number is ordered. § 701. The "usual number" is 1,682, to be divided between bound and unbound copies and distributed to named officers or offices of the House and Senate, to the Library of Congress, and to the Superintendent of Documents for further distribution "to the State libraries and designated depositories." *Ibid.*[14] There are also statutory provisions for the printing of extra copies, § 702, bills and resolutions, § 706–708, public and private laws, postal conventions, and treaties, §§ 709–712, journals, § 713, the Congressional Directory, § 721–722, memorial addresses, § 723–724, and the Statutes at Large, § 728–729. Section 733 provides that "[t]he Public Printer on order of a Member of Congress, on prepayment of costs, may reprint documents and reports of committees together with the evidence papers submitted, or any part ordered printed by the Congress."

With respect to printing for the Executive and Judicial Branches, it is provided that "[a] head of an executive department . . . may not cause to be printed, and the Public Printer may not print, a document or matter unless it is authorized by law and necessary to the public business." § 1102 (a). The executive departments and

[14] For the authorization to supply sufficient copies for such distribution see § 738. The Public Printer is also required to furnish the Department of State with 20 copies of all congressional documents and reports. 44 U. S. C. § 715.

the courts are to requisition printing by certifying that it is "necessary for the public service." § 1103.

The Superintendent of Documents has charge of the distribution of all public documents except those printed for use of the executive departments, "which shall be delivered to the departments," and for either House of Congress, "which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service." § 1702. He is thus in charge of the public sale and distribution of documents. The Public Printer is instructed to "print additional copies of a Government publication, not confidential in character, required for sale to the public by the Superintendent of Documents," subject to regulation by the Joint Committee on Printing. § 1705.

It is apparent that under this statutory framework, the printing of documents and their general distribution to the public would be "within the outer perimeter" of the statutory duties of the Public Printer and the Superintendent of Documents. *Barr* v. *Mateo, supra,* at 575. Thus, if official immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule.

The duties of the Public Printer and his appointee, the Superintendent of Documents, are to print, handle, distribute, and sell government documents. The Government Printing Office acts as a service organization for the branches of the Government. What it prints is produced elsewhere and is printed and distributed at the direction of the Congress, the departments, the independent agencies and offices, or the Judicial Branch of the Government. The Public Printer and Superintendent of Documents exercise discretion only with respect to estimating the demand for particular documents and ad-

justing the supply accordingly. The existence of a Public Printer makes it unnecessary for every government agency and office to have a printer of its own. The Printing Office is independently created and manned and imbued with its own statutory duties; but, we do not think that its independent establishment carries with it an independent immunity. Rather, the Printing Office is immune from suit when it prints for an executive department for example, only to the extent that it would be if it were part of the department itself or, in other words, to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents. To hold otherwise would mean that an executive department could acquire immunity for non-immune materials merely by presenting the proper certificate to the Public Printer, who would then have the duty to print the material. Under such a holding, the department would have a seemingly foolproof method for manufacturing immunity for materials which the court would not otherwise hold immune if not sufficiently connected with the "official duties" of the department. *Howard* v. *Lyons*, 360 U. S., at 597.

Congress has conferred no express, statutory immunity on the Public Printer or the Superintendent of Documents. Congress has not provided that these officials should be immune for printing and distributing materials where those who author the materials would not be. We thus face no statutory or constitutional problems in interpreting this doctrine of "judicial making." *Barr* v. *Matteo*, 360 U. S., at 569. We do, however, write in the shadow of *Bd. of Regents of State Colleges* v. *Roth*, 408 U. S. 564 (1972), and *Wisconsin* v. *Constantineau*, 400 U. S. 433 (1971), where the Court advised caution "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him . . . ." *Id.*, at 437. We conclude that, for

the purposes of the judicially fashioned doctrine of immunity, the Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," *Tenney* v. *Brandhove*, 341 U. S., at 376, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Because we think the Court of Appeals applied the immunities of the Speech or Debate Clause and of the doctrine of official immunity too broadly, we must reverse its judgment and remand the case for appropriate further proceedings.[15] We are unaware, from this record, of the extent of the publication and distribution of the Report which has taken place to date. Thus we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded. These matters are for the lower courts in the first instance.

Of course, like the Court of Appeals, we indicate nothing as to whether petitioners have pleaded a good cause of action or whether respondents have other defenses,

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[15] With respect to the District of Columbia respondents, the Court of Appeals found that they were acting within the scope of their authority under applicable law and, as a result, were immune from suit. We do not disturb the judgment of the Court of Appeals in this respect.

constitutional or otherwise. We have dealt only with the threshold question of immunity.[16]

The judgment of the Court of Appeals is reversed in part and affirmed in part, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

So ordered.

[16] We thus have no occasion to consider Art. I, § 5, cl. 3, which requires that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."; nor need we deal with publications of the Judicial Branch and the legal immunities that may be attached thereto.

SUPREME COURT OF THE UNITED STATES

No. 71–6356

John Doe et al., Petitioners, *v.* John L. McMillan et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring.

I agree with the Court that the issue tendered is justiciable, and that the complaint states a cause of action. Though I join the opinion of the Court, I amplify my own views as they touch on the merits.

I

Respondents, relying primarily on *Gravel* v. *United States*, 408 U. S. 606, urge that the Report, concededly part and parcel of the legislative process, is immune from the purview of the courts under the Speech or Debate Clause of Art. I, § 6, of the Constitution.[1] In *Gravel* we held that neither Senator Gravel nor his aides could be held accountable or questioned with respect to events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. The immunity in that case attached to the Senator and his aides, and there is no intimation whatsoever that committee reports are sacrosanct from judicial scrutiny. In fact, the Court disclaimed any need to "address issues that may arise when Congress or either

[1] That Clause in relevant part provides:

". . . and for any Speech or Debate in either house, [Senators and Representatives] shall not be questioned in any other Place."

House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports, or other materials." [2] *Id.*, at 626 n. 16.

"Legislative immunity does not, of course, bar all judicial review of legislative acts." *Powell* v. *McCormack*, 395 U. S. 486, 503. "The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Id.*, at 505. This has been clear since Chief Justice Marshall's seminal decision in *Marbury* v. *Madison*, 1 Cranch. 137. We always have recognized the "judicial power to determine the validity of legislative actions impinging on individual rights." *Gravel* v. *United States*, *supra*, at 620.

In *Kilbourn* v. *Thompson*, 103 U. S. 168, the Court's first decision to consider the Speech or Debate Clause, the Court held unconstitutional a resolution of the House ordering the arrest of Kilbourn for refusing to honor a subpoena of a House investigating committee, since the House had no power to punish for contempt. Although the Court barred a claim for false imprisonment against Members of the House, it nevertheless reached the merits of Kilbourn's claim and allowed an action against the House's Sergeant At Arms, who had executed the warrant for Kilbourn's arrest.

Dombrowski v. *Eastland*, 387 U. S. 82, involved suits for an injunction and for damages against a Senator who headed a subcommittee of the Senate Judiciary Committee and counsel to the subcommittee for wrongful and unlawful seizure of property in violation of the Fourth

[2] The Committee report was transmitted to the House by the Chairman of the Committee, was referred to the Calendar of the Committee of the Whole House on the State of the Union, and was ordered to be printed.

Amendment. We agreed that the complaint against the Senator must be dismissed because the record "does not contain evidence of his involvement in any activity that could result in liability." *Id.*, at 84. As respects counsel to the subcommittee we held, in reliance on *Tenney* v. *Brandhove*, 341 U. S. 367, that the immunity granted by the Speech or Debate Clause "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." 387 U. S., at 85. Accordingly, we remanded the case against counsel to the subcommittee for trial because there was "a sufficient factual dispute" to require a trial. Acts done in violation of the Fourth Amendment—like assaults with fists or clubs or guns—are outside the protective ambit of the Speech or Debate Clause; *certainly violations of the Fourth Amendment are not within the scope of a legitimate legislative purpose.*

A striking illustration of the same principle was stated in *Watkins* v. *United States*, 354 U. S. 178, 188: "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." And see *Barenblatt* v. *United States*, 360 U. S. 109, 153, 166 (dissenting opinions). A witness subpoenaed to testify before a congressional committee may not be forced to reveal his beliefs. One's conscience and thoughts are matters of privacy as is the whole array of one's beliefs or values. And, as *Watkins* indicates, a witness refusing to so testify may not be punished for contempt. *Violations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose.*

I cannot agree, then, that the question for us is "whether [public dissemination], simply because authorized by Congress, must always be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' with respect to legislative or other matters before the House." A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy. Unless we are to put blinders on our Congressmen and isolate them from their constituents, the informing function must be entitled to the same protection of the Speech or Debate Clause as those activities which relate directly and necessarily to the immediate function of legislating. See *Gravel* v. *United States*, *supra*, at 634–637 (DOUGLAS, J., dissenting), 649–662 (BRENNAN, J., dissenting). In my view the question to which we should direct our attention is whether the House Report infringes upon the constitutional rights of petitioners and therefore is subject to scrutiny by the federal courts.

II

The House authorized its District Committee "to conduct a full and complete investigation and study of . . . (1) the organization, management, operation and administration of any department or agency of the government of the District of Columbia; (2) the organization, management, operation and administration of any independent agency or instrumentality of government operating solely in the District of Columbia." [3]

It was pursuant to this investigation and study that the Report in effect brands certain named students as juve-

[3] H. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784.

nile delinquents. As stated by Judge Wright in his dissent below:

> "The material included in the Committee report is not, as the majority contends, merely 'somewhat derogatory.' One disciplinary letter, for example, alleges that a specifically named child was 'involved in the loss of fifty cents' and 'invited a male substitute to have sexual relations with her, gapping her legs open for enticement.' Similar letters accused named children of disrespect, profanity, vandalism, assault and theft. Of the 29 test papers published in the report, 21 bore failing grades. Yet appellants seek only to prohibit use of the children's names without their consent. They do not contest the propriety of the investigation generally, nor do they seek to enjoin the conclusions or text of the report. Indeed, they do not even challenge the right of Congress to examine and summarize the confidential material involved. They wish only to retain their anonymity." 459 F. 2d 1304, 1324.

We all should be painfully aware of the potentially devastating effects of congressional accusations. There are great stakes involved when officials condemn individuals by name. The age of technology has produced data banks into which all social security numbers go; and following those numbers go data in designated categories concerning the lives of members of our communities. Arrests go in, though many arrests are unconstitutional. Acts of juvenile delinquency are permanently recorded and they and other alleged misdeeds or indiscretions may be devastating to a person in later years when he has outgrown youthful indiscretions and is trying to launch a professional career or move into a position where steadfastness is required.

Congress, in naming the students without justification exceeded the "sphere of legitimate legislative activity." *Tenney* v. *Brandhove, supra,* at 376. There can be no question that the resolution authorizing the investigation and study expressed a legitimate legislative purpose. Nevertheless, neither the investigatory nor, indeed, the informing function of Congress authorizes any "congressional power to expose for the sake of exposure." *Watkins* v. *United States, supra,* at 200. To the contrary, there is simply "no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." *Id.,* at 187. The names of specific students were totally irrelevant to the purposes of the study. The functions of the Committee would have been served equally well if the students had remained anonymous.

It is true, of course, that members of Congress may, even in a case such as this, retain their immunity under the Speech or Debate Clause. But in this case, both the Public Printer and the Superintendent of Documents, official agencies entrusted by Congress with printing responsibilities, are named as defendants. And in the context of this case, such defendants may be held responsible for their actions. See *Powell* v. *McCormack, supra; Dombrowski* v. *Eastland, supra; Kilbourn* v. *Thompson, supra.*

At the very least petitioners are entitled to injunctive relief. The scope of the injunction and against whom it should operate only can be determined upon remand after a full hearing on the facts. We cannot say whether there is a threat of future public distribution or whether it will be feasible for any person subject to the equitable powers of the court to excise the students' names from Reports previously distributed. With respect to damages—that is, whether respondents, including the mem-

bers of the District of Columbia government if a valid claim is stated against them, are protected by the doctrine of official immunity as set forth in the opinion for the Court—I agree that it is a matter for the lower courts in the first instance.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., Petitioners, *v.* John L. McMillan et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I cannot accept the proposition that the judiciary has power to carry on a continuing surveillance of what Congress may and may not publish by way of reports on inquiry into subjects plainly within the legislative powers conferred on Congress by the Constitution. The inquiries conducted by Congress here were within its broad legislative authority and the specific powers conferred by cl. 17, § 8, Art. I.

It seems extraordinary to me that we grant to the staff aides of Members of the Senate and the House an immunity that the Court today denies to a very senior functionary, the Public Printer. Historically and functionally the Printer is simply the extended arm of the Congress itself, charged by law with executing congressional commands.

Very recently, in *United States* v. *Brewster*, 408 U. S. 501, 516 (1972), we explicitly took note of the "conscious choice" made by the authors of the Constitution to give broad privileges and protection to Members of Congress for acts within the scope of their legislative function. As JUSTICES BLACKMUN and REHNQUIST have demonstrated so well, the acts here complained of were not outside the traditional legislative function of Congress. I join fully in the concurring and dissenting opinions of MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST, *post*, —.

SUPREME COURT OF THE UNITED STATES

No. 71-6356

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[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST'S opinion, *post*, —, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the

floor. *Gravel* v. *United States*, 408 U. S. 606, 617, 624 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 502 (1969); *Kilbourn* v. *Thompson*, 103 U. S. 168, 204 (1881).[1] That protection is preserved by the Court in this case, *ante*, pp. 5–7, because the Court appreciates that Congress must possess uninhibited internal communication.

The Court previously has observed that Congress possesses the power "to inquire into and publicize corruption, maladministration or inefficiency in the agencies of the Government" because the public is "entitled to be informed concerning the workings of its government." *Watkins* v. *United States*, 354 U. S. 178, 200 and n. 33 (1957). Indeed, as to this kind of activity, Woodrow Wilson long ago observed, "The informing function of Congress should be preferred even to its legislative function."[2] The Speech or Debate Clause is an outgrowth

[1] We are to read the Speech or Debate Clause "broadly to effectuate its purposes." *United States* v. *Johnson*, 383 U. S. 169, 180 (1966); *Gravel* v. *United States*, 408 U. S. 606, 624 (1972). The "central role" of the Clause is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States*, *supra*, 408 U. S., at 617. The breadth of coverage of the Speech or Debate Clause must be no less extensive than the legislative process it is designed to protect, for the Clause insures for Congress "wide freedom of speech, debate, and deliberation without intimidation from the Executive Branch," *Gravel* v. *United States*, 408 U. S., at 616, or, I might suppose, from the judiciary.

[2] "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be pre-

of the English doctrine that the courts should not be utilized as instruments to impede the efficient functioning of Parliament. *Kilbourn* v. *Thompson*, 103 U. S., at 201–205. Because the "informing function" is an essential attribute of an effective Legislative Branch, I feel the Court's curtailment of that function today violates the historical tradition signified textually by the Speech or Debate Clause and underlying our doctrine of separation of powers.

It may be that a congressional committee's activities and report are not protected absolutely by the Speech or Debate Clause. One may assume that there must be a legitimate legislative purpose in undertaking the investigation or hearing that culminates in the report. *Watkins* v. *United States*, 354 U. S., at 200; *Barenblatt* v. *United States*, 360 U. S. 109 (1959). I suggest, however, that the publication and distribution of a report compiled in connection with an officially authorized investigation is as much an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation," *Gravel* v. *United States*, 408 U. S., at 625, as is the gathering of information or writing and voting for the publication of the report. In the case before us, there can be no question that the activities of the District of Columbia Committee of the House of Representatives were officially authorized and undertaken for a proper legislative purpose. Plenary jurisdiction over the District of Columbia is specifically vested

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ferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration," W. Wilson, Congressional Government, 303 (1895).

in Congress by Art. I, § 8, of the Constitution.[3] Matters such as the quality of education afforded by the District's schools, and the administrative problems they face, obviously are within the scope of the jurisdiction of the District Committee. In this case, it legitimately undertook its investigation of the administration of the school system.[4] At the conclusion of its investigation the Committee decided, as did the Committee of the Whole House on the State of the Union,[5] that, as a matter of legislative judgment, the report should be printed. It was stated that attachments to one portion thereof were included to "give a realistic view" of a troubled school "and the lack of administrative efforts to rectify the multitudinous problems there."[6] The report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.[7] This decision,

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[3] Article I, § 8:

"The Congress shall have Power . . .

. . . . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . ."

[4] House Resolution 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969), authorized the Committee, "as a whole or by subcommittee . . . to conduct a full and complete investigation" of the "organization, management, operation, and administration of any department or agency," and of "any independent agency or instrumentality" of government in the District of Columbia.

[5] 116 Cong. Rec. 40311 (1970).

[6] H. R. Rep. No. 91-1681, 91st Cong., 2d Sess., 212 (1970).

[7] The Court notes, *ante*, p. 17, apparently in alleviation of its conclusion as to possible liability, that a specific statutory grant of immunity to the Public Printer and the Superintendent of Documents relieving them of personal liability for the distribution of an unprotected document has not been conferred. But it is not clear how, if liability otherwise exists, such a grant of immunity would shield these public servants in a case involving alleged constitutional

though reasonable men well may differ as to its wisdom, was a conscious exercise of legislative discretion constitutionally vested in the Legislative Branch and not subject to review by the judiciary. Indeed, as MR. JUSTICE REHNQUIST observes, *post*, p. 2, this Court has stated that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951).

Although the Court in the present case holds that the gathering of information, the preparation of a report, and the voting on a resolution authorizing the printing of a committee report are protected activities under the Speech or Debate Clause, it renders that protection for Members of Congress and legislative personnel less than meaningful by further holding that the authorized public distribution of a committee document may be enjoined and those responsible for the distribution held liable when the document contains materials "otherwise actionable under local law." *Ante*, p. 10. The Court's holding thus imposes on Congress the onerous burden of justifying, apparently by "substantial evidence," *ibid.*, the inclusion of allegedly actionable material in committee documents.[8] This, unfortunately, ignores the realities

violations. Thus, the Court has placed the Public Printer and Superintendent of Documents in the untenable position either of accepting the risk of personal liability, whenever a congressional document officially is printed and distributed, or of violating the specific command of a congressional resolution ordering the printing and distribution.

[8] An interesting dilemma is presented by the possibility of an injunction against distribution where "otherwise actionable" material is printed in the Congressional Record. The Court recognizes the existence of this problem and reserves its resolution for another day. *Ante*, p. 19, n. 16. The Congressional Record, however, receives wide public distribution on a regular basis and it is not an uncommon occurrence for all or part of a committee report or other document to be read into the Record by a Member of Congress. In light of

of the "deliberative and communicative processes," *Gravel* v. *United States*, 408 U. S., at 625, by which legislative decisionmaking takes place.

Although it is regrettable that a person's reputation may be damaged by the necessities or the mistakes of the legislative process,[9] the very act of determining judicially whether there is "substantial evidence" to justify the inclusion of "actionable" information in a committee report is a censorship that violates the congressional free speech concept embodied in the Speech or Debate Clause[10] and is, as well, the imposition of this Court's judgment in matters textually committed to the discre-

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the Court's holding in this case, it is conceivable that, in lieu of separate publication as a committee document, a committee report containing possibly actionable material hereafter will be printed in the Record in order to effectuate public distribution. It appears to me almost beyond question that an injunction against the distribution of the Congressional Record is clearly precluded by the Speech or Debate Clause and by the Constitution's Art. I, § 5, cl. 3, providing that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."

[9] Only last Term, in *United States* v. *Brewster*, 408 U. S. 501, 516–517 (1972), the Court emphasized that

"In its narrowest scope, the [Speech or Debate] Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers . . . . The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."

[10] I do not reach the question whether the withholding of information from the public with respect to matters being considered by elected representatives in any way diminishes protected First Amendment values.

tion of the Legislative Branch by Art. I of the Constitution. I suspect that Chief Justice Marshall and his concurring Justices would be astonished to learn that the time-honored doctrine of judicial review they enunciated in *Marbury* v. *Madison*, 1 Cranch 137 (1803), has been utilized to foster the result reached by the Court today.[11]

Stationing the federal judiciary at the doors of the Houses of Congress for the purpose of sanitizing congressional documents in accord with this Court's concept of wise legislative decisionmaking policy appears to me to reveal a lack of confidence in our political processes and in the ability of Congress to police its own members. It is inevitable that occasionally, as perhaps in this case, there will be unwise and even harmful choices made by Congress in fulfilling its legislative responsibility. That, however, is the price we pay for representative government. I am firmly convinced that the abuses we countenance in our system are vastly outweighed by the demonstrated ability of the political process to correct overzealousness on the part of elected representatives.

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[11] "The premise that courts may refuse to enforce legislation they think unconstitutional does not support the conclusion that they may censor congressional language they think libelous. We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem." *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729, 731–732 (DC 1956 (three-judge court)).

SUPREME COURT OF THE UNITED STATES

No. 71-6356

John Doe et al., Petitioners, *v.* John L. McMillan et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, and with whom MR. JUSTICE STEWART joins as to Part I, concurring in part and dissenting in part.

I concur in the Court's holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee Report for distribution within the halls of Congress. I dissent from the Court's holding that Members of Congress might be held liable if they were in fact responsible for public dissemination of a committee report, and that therefore the Public Printer or the Superintendent of Documents might likewise be liable for such distribution. And quite apart from the immunity which I believe the Speech or Debate Clause confers upon congressionally authorized public distribution of committee reports, I believe that the principle of separation of powers absolutely prohibits any form of injunctive relief in the circumstances here presented.

I

In *Gravel* v. *United States*, 408 U. S. 606 (1972), we decided that the Speech or Debate Clause of the Constitution did not protect private republication of a committee report, but left open the question of whether publication and public distribution of such reports au-

thorized by Congress would be included within the privilege. 408 U. S., at 626 n. 16. While there are intimations in today's opinion that the privilege does not cover such authorized public distribution, the ultimate holding is apparently that the District Court must take evidence and determine for itself whether or not such publication in this case was within the "legitimate legislative needs of Congress," *ante*, at 18.

While there is no reason for a rigid, mechanical application of the Speech or Debate Clause, there would seem to be equally little reason for a completely *ad hoc*, factual determination in each case of public distribution as to whether that distribution served the "legitimate legislative needs of Congress." A supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed. This disposition is particularly anomalous when viewed in light of our earlier views on the scope of the constitutional privilege to the effect that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove*, 341 U. S. 367, 377 (1951). A factual hearing in the District Court could scarcely avoid inquiry into legislative motivation.

Previous decisions of this Court have upheld the immunity of Members whenever they are "acting in sphere of legitimate legislative activity." *Tenney* v. *Brandhove*, *supra*, 341 U. S., at 376. In *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880), we held that this immunity extends to everything "generally done in a session of the House by one of its members in relation to the business before it." 103 U. S., at 204. This relatively expansive interpretation of the scope of immunity has been consistently reaffirmed. *United States* v. *Johnson*, 383 U. S. 169, 179 (1966); *United States* v. *Brewster*, 408 U. S. 501, 509 (1972).

The subject matter of the Committee Report here in question was, as the Court notes, concededly within the legislative authority of Congress. Congress has jurisdiction over all matters within the District of Columbia, U. S. Const., Art. I, § 8, cl. 17, and the Committee was authorized by the full House to investigate the District's public school system. H. R. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969). And we have held that with respect to the preliminary inquiries, such as the findings here represent, concerning potential legislation, Congress' power "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States*, 360 U. S. 109, 111 (1959).

In *Kilbourn* v. *Thompson*, *supra*, 103 U. S., at 204, *Powell* v. *McCormack*, 395 U. S. 486, 502 (1969), and *Gravel* v. *United States*, *supra*, 408 U. S., at 624, the Court has held that committee reports are absolutely privileged. In neither *Kilbourn* nor *Powell* was any distinction intimated between internal and public distribution of the reports. And while the question was reserved in *Gravel*, a comparison of the factual background surrounding Senator Gravel's reading into the committee record, the Pentagon Papers, and the limited publication apparently undertaken here, indicates that the difference in actual effect between the two is indeed minimal. The only difference between Senator Gravel's widely publicized reading, in the presence of numerous spectators and journalists, and the public distribution of this report, is that the former was confined within the legislative halls. But it can scarcely be doubted that information produced at a publicly attended committee hearing within the legislative halls may well as a practical matter receive every bit as much public circulation as information contained in a committee report which is itself publicly circulated.

To the extent that public participation in a relatively open legislative process is desirable, the Court's holding makes the materials bearing on that process less available than they might be. And the limitation thus judicially imposed is squarely contrary to the expressed intent of Congress. The Committee Report was ordered printed by the full House sitting as a Committee of the Whole. 116 Cong. Rec. H. 11347 (Dec. 8, 1970). It was thereafter printed and distributed by the Government Printing Office solely in accordance with statutory provisions. 44 U. S. C. §§ 501, 701 (1970). These provisions state specifically that the Public Printer may print only the number of copies designated by the Congress, such number, in the absence of contrary indication, being "the usual number" established by statute as 1,682. These copies may be distributed only "among those entitled to receive them." *Id.*, at § 701 (a). The distributees are specifically designated in the statute itself. *Id.*, at § 701 (c). Extra copies may be printed only by simple, concurrent, or joint resolution. *Id.*, at § 703. Thus every action taken by the Public Printer and the Superintendent of Documents, so far as this record indicates, was under the direction of Congress.

I agree with the Court that the Public Printer and the Superintendent of Documents have no "official immunity" under the authority of *Barr* v. *Matteo*, 360 U. S. 564 (1959). There is no immunity there when officials are simply carrying out the directives of officials in the other branches of government, rather than performing any discretionary function of their own. But for this very reason, if the body directing the publication or its Members would be immune from themselves publishing and distributing, the Printer and the Superintendent should be likewise immune. I do not understand the Court to hold otherwise. Because I would hold the Members immune had they undertaken the public distribution, I

would likewise hold the Superintendent and the Printer immune for having done so under the authority of the resolution and statute. The Court's contrary conclusion, perhaps influenced by the allegations of serious harm to the petitioners contained in their complaint, unduly restricts the privilege. The sustaining of any claim of privilege invariably forecloses further inquiry into a factual situation which, in the absence of privilege, might well have warranted judicial relief. The reason why the law has nonetheless established categories of privilege has never been better set forth than in the opinion of Judge Learned Hand in *Gregoire* v. *Biddle*, CA2, 177 F. 2d 579:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burdens of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the

answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

II

Entirely apart from the immunity conferred by the Speech or Debate Clause on these respondents, I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executive Branches. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137 (1803); *Youngstown Sheet and Tool Co.* v. *Sawyer*, 343 U. S. 579 (1952); *Kilbourn* v. *Thompson*, *supra*. But the prospect of the District Court enjoining a committee of Congress, which, in the legislative scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution.

In *Mississippi* v. *Johnson*, 4 Wall. 475 (1886), an action was brought seeking to enjoin the President from executing a duly enacted statute on the ground that such executive action would be unconstitutional. The Court there expressed the view that I believe should control the availability of the injunctive relief here:

> "The Congress is the legislative department of the government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Id.*, at 500.

In *Kilbourn* v. *Thompson, supra,* the Court reviewed the arrest and confinement of a private citizen by the Sergeant-at-Arms of the House of Representatives. In *Watkins* v. *United States,* 354 U. S. 178 (1957), the Court reviewed the scope of the investigatory powers of Congress when the executive had prosecuted a recalcitrant witness and sought a judicial forum for the purpose of imposing criminal sanctions on him. Neither of these cases comes close to having the mischievous possibilities of censorship being imposed by one branch of the Government upon the other as does this one.

In *New York Times* v. *United States,* 403 U. S. 713 (1971), this Court held that prior restraint comes before it bearing a heavy burden. *Id.,* at 714. Whatever may be the difference in the constitutional posture of the two situations, on the issue of injunctive relief, which is nothing if not a form of prior restraint, a Congressman should stand in no worse position in the federal courts than does a private publisher. Cf. *Hurd* v. *Hodge,* 334 U. S. 24, 34–35 (1948). Purely as a matter of regulating the exercise of federal equitable jurisdiction in the light of the principle of separation of powers, I would foreclose the availability of injunctive relief against these respondents.